Saimon a/l Anthony lwn Pendakwa Raya dan lain-lain rayuan

MAHKAMAH RAYUAN (PUTRAJAYA) — RAYUAN JENAYAH NO C-05(M)-128–03 TAHUN 2019, C-05(M)-129–03 TAHUN 2019, C-05(M)-130-03 TAHUN 2019, C-05(M)-131–03 TAHUN 2019 DAN C-05(M)-132–03 TAHUN 2019

KAMALUDIN MD SAID, LEE HENG CHEONG DAN HASHIM HAMZAH HHMR

15 MAC 2023

Prosedur Jenayah — Rayuan — Rayuan terhadap sabitan dan hukuman — Perayu-perayu dituduh membunuh di bawah s 302 Kanun Keseksaan dibaca bersama s 34 Kanun Keseksaan — Perayu-perayu disabitkan dan dihukum gantung sehingga mati — Sama ada keterangan pengecaman oleh saksi-saksi pendakwaan adalah selamat untuk diterima oleh mahkamah bagi menyabitkan perayu-perayu dengan kesalahan yang dipertuduhkan — Sama ada penolakan penerimaan masuk rakaman video sebagai ekshibit adalah berlandaskan undang-undang — Sama ada ketiadaan kesan DNA menjejaskan kes — Sama ada pembelaan alibi tidak diberikan pertimbangan sewajarnya — Sama ada pembelaan tidak dipertimbangkan — Sama ada kesan bencana tubuh badan kepada si mati adalah 'mencukupi pada lazimnya untuk menyebabkan kematian' — Sama ada isu-isu yang dibangkitkan oleh perayu-perayu adalah bermerit — Kanun Keseksaan ss 34 & 302

Perayu-perayu telah dituduh di Mahkamah Tinggi dibawah s 302 Kanun Keseksaan ('KK') dibaca bersama s 34 KK kerana membunuh Pachaippan @ Arasu a/l Arimuthu ('si mati') pada 22 November 2014 jam lebih kurang 2.30 pagi hingga 3.30 pagi di kawasan tepi jalan, Jalan Bendera 13, Taman Bukit Bendera, 28400 Mentakab, Pahang. Pada malam kejadian, Gan Irroshini ('SP18') berada ditingkat atas rumah kedai ayahnya, Gan Tiong Hock ('SP20') manakala SP20 bersama-sama Chong Choon Hau ('SP19'), Alakiri Swamy Nathan ('SP21'), Gan Soo Lee dan si mati, serta sekumpulan remaja yang merupakan ahli kumpulan 'Geng Siva' sedang menikmati barbeku di tingkat bawah rumah tersebut. Setelah mendengar bunyi bising di tingkat bawah rumah, SP18 telah melihat ke bawah melalui tingkap dan melihat beberapa orang yang dikenalinya sebagai Chinniah dan Siva Polis, serta seorang lelaki berbangsa India yang tidak dikenali, telah keluar dari sebuah kereta. SP18 melihat berlakunya pertengkaran mulut di antara Chinniah dan Siva Polis di satu pihak, dan SP20, si mati dan Mahendran iaitu adik SP20, di satu pihak yang lain. Kemudian, Chinniah, Siva Polis dan seorang lelaki berbangsa India yang tidak dikenali tersebut telah beredar dari rumah tersebut. Tidak lama kemudian, ketiga-tiga mereka telah kembali ke rumah tersebut bersama lebih kurang 20 orang yang lain, termasuklah yang dikenali sebagai Mohanna

(Morgan), Ravi dan Shamugan yang merupakan ahli 'Geng Mohana'. SP18 melihat berlakunya baling membaling kayu palet, batu dan besi ke arah rumah SP20. Geng Siva pula membalas dengan membaling semula barang-barang tersebut serta menyimbah air panas ke arah Geng Mohana menyebabkan mereka berundur ke persimpangan di hujung jalan. SP18 telah merakamkan insiden yang berlaku pada malam tersebut dari tingkat atas rumah SP20. Setelah berhenti merakam video, SP18 telah turun ke tingkat bawah rumah untuk menutup 'shutter' dan kemudiannya menyeberang jalan untuk pergi ke rumah jirannya, Vehtavalli a/p Sewaras ('SD9'). SP18 sambung merakam video dari rumah jirannya tersebut. Kemudian, SP18 melihat Geng Mohana semakin ramai dan mereka telah bergerak menghampiri rumah SP20. SP18 dapat melihat perayu keempat menetak bahagian belakang bahu kanan si mati dengan menggunakan parang di tingkat bawah rumah SP20. Si mati telah berlari ke arah motosikalnya di kawasan tong sampah sebelum jatuh terlentang akibat terlanggar besi ampaian. Selepas itu, si mati telah ditetak oleh perayu kedua, ketiga dan keempat dengan menggunakan parang. Perayu pertama pula berjalan perlahan-lahan sambil menyeret dan menghentak parangnya ke atas tanah. Perayu kelima pula telah menarik motosikal si mati, menolaknya ke atas badan si mati dan membaling sesuatu ke arah motosikal tersebut sehingga mengakibatkan percikan api dan terbakar. SP19 pula telah pulang ke rumahnya ketika Geng Mohana berundur ke persimpangan jalan. Setelah Geng Mohana kembali mendekati rumah SP20, SP19 melihat perayu keempat datang dan menetak bahagian belakang atas badan si mati dengan parang. Kemudian, si mati telah berundur, beredar dari pagar, terlanggar tiang ampaian dan jatuh terlentang. Pada waktu itu, SP19 melihat perayu pertama, kedua, ketiga dan keempat menetak si mati dengan menggunakan parang. Perayu kelima telah mengambil sebuah motosikal dan menghempapnya di atas badan si mati dan kemudiannya membakar motosikal tersebut. Menurut SP21, dia dapat melihat perayu kedua, ketiga dan keempat menetak si mati dengan menggunakan parang. Pada waktu itu juga kelima-lima perayu dilihat berada di tempat yang sama. Selepas perayu-perayu beredar dari tempat kejadian, SP21 dan seorang kawannya telah membawa si mati ke Hospital Mentakab. SP16 merupakan pegawai polis yang telah menangkap perayu kedua, ketiga, keempat dan kelima. Perayu kedua telah memandu arah SP16 ke rumah Ravindran a/l Valayuthan ('SP12'). Di sana, SP12 mengakui bahawa perayu kedua ada menyerahkan parang kepadanya yang telah diletakkan di bawah akuarium di luar rumah tetapi parang tersebut telah hilang. Sebelum beredar, SP16 meminta Sivakami a/p Arumugam ('SP15') untuk menghubunginya jika parang tersebut telah dijumpai. Tidak lama kemudian, SP15 telah menghubungi SP16 semula memaklumkan bahawa tiga bilah parang telah dijumpai di bawah katil SP12 dan telah dirampas. Pakar perubatan forensik ('SP2') telah menjalankan bedah siasat ke atas mayat si mati dan mengesahkan bahawa punca kematian si mati adalah luka tetak berganda di bahagian kepalanya. Di akhir kes pendakwaan, hakim bicara mendapati bahawa pihak pendakwaan telah berjaya membuktikan kes prima facie terhadap

perayu-perayu dan mengarahkan mereka untuk membela diri. SD9 dan Vanishree a/p Gunaseelan ('SD10') telah dipanggil untuk menyokong keterangan perayu-perayu bahawa mereka tidak menetak si mati dengan parang. SD9 dan SD10 mendakwa bahawa seorang lelaki yang memakai baju bercorak petak-petak yang telah menetak si mati, pengecaman dibuat terhadapnya melalui rakaman video. Di akhir kes pembelaan, hakim bicara mendapati bahawa perayu-perayu telah gagal untuk menimbulkan keraguan yang munasabah terhadap kes pendakwaan dan pihak pendakwaan telah berjaya membuktikan kes melampaui keraguan munasabah terhadap perayu-perayu. Maka, perayu-perayu telah didapati bersalah oleh hakim bicara, disabitkan dengan pertuduhan, dan dihukum gantung di leher sehingga mati. Oleh itu, rayuan ini.

Diputuskan, menolak rayuan perayu-perayu:

(1) Dapatan hakim bicara adalah disokong oleh keterangan yang telah dikemukakan di hadapannya. Selain daripada itu juga, keterangan kes juga menunjukkan bahawa SP18, SP19 dan SP21 sudah pun mengenali perayu kedua, ketiga, keempat dan kelima sebelum kejadian berlaku dan boleh mengecam serta menceritakan secara terperinci penglibatan setiap seorang daripada mereka sewaktu kejadian pembunuhan si mati berlaku. Walaupun hakim bicara tidak merujuk secara khusus kepada 'Turnbull Guidelines' dan tidak memberikan amaran kepada dirinya berkenaan bahayanya sabitan atas keterangan pengecaman perayu-perayu semata-mata dalam alasan penghakimannya, hakim bicara telah menerima keterangan SP18, SP19 dan SP21 setelah menimbangkan kualiti keterangan pengecaman mereka dengan teliti dan menyeluruh. Oleh itu, tiada sebarang kegagalan keadilan telah berlaku terhadap perayu-perayu dan tiada salah arah dilakukan oleh hakim bicara dalam dapatannya. Keduanya, laporan kawad cam hanyalah bersifat keterangan sokongan sahaja dan keterangan substantif adalah keterangan pengecaman saksi-saksi pendakwaan terhadap perayu-perayu di mahkamah. Ketiadaan laporan kawad cam langsung tidak menjejaskan kes pendakwaan. Ketiga, percanggahan-percanggahan dalam keterangan SP18, SP19 dan SP21 yang dibangkitkan oleh perayu-perayu adalah minor dan tidak material. Percanggahan-percanggahan tersebut timbul akibat daripada perbezaan sudut pandangan saksi-saksi yang melihat kejadian tersebut. Keterangan mereka adalah konsisten dan tidak bercanggah berkenaan intipati penting kes terhadap perayu-perayu. Hal ini menunjukkan bahawa saksi-saksi tersebut bercakap benar dan tidak diajar untuk memberikan keterangan. Kewujudan percanggahan-percanggahan dalam keterangan SP18, SP19 dan SP21 tidak melemahkan kredibiliti SP18, SP19 dan SP21. Akhir sekali, hakim bicara telah menimbangkan isu kebolehpercayaan keterangan SP18, SP19 dan SP21 dengan teliti dan menyeluruh sebelum menerima

keterangan mereka. Hakim bicara juga telah menimbangkan isu kebolehpercayaan keterangan SD9 dan SD10 dengan teliti dan menyeluruh sebelum menolak keterangan mereka. Hakim bicara tidak tersalah arah dalam menimbangkan keterangan SP18, SP19, SP21, SD9 dan SD10. Tiada prinsip undang-undang yang menyatakan bahawa keterangan saksi yang berkepentingan harus ditolak mentah-mentah oleh mahkamah. Hakim bicara yang mempunyai kelebihan audio visual telah membuat penilaian yang menyeluruh terhadap keterangan saksi-saksi ini dan membuat dapatan fakta bahawa keterangan mereka adalah konsisten dan boleh dipercayai. Oleh itu, mahkamah ini selaku mahkamah yang mendengar rayuan seharusnya tidak mengganggu dapatan fakta hakim bicara tersebut secara sewenang-wenangnya melainkan terdapatnya sebab yang kukuh untuk melakukan sedemikian seperti penyalaharahan atau sebagainya. Keterangan pengecaman SP18, SP19 dan SP21 terhadap perayu-perayu adalah kukuh dan konsisten, serta selamat untuk diterima oleh mahkamah dalam menyabitkan mereka dengan pertuduhan kes ini. Tiada sebarang merit terhadap isu bersama yang dibangkitkan oleh perayu-perayu dalam rayuan ini (lihat perenggan 41, 43, 45, 47, 50, 53, 55, 61, 66–70 & 72–73).

(2) Seksyen 27 Akta Keterangan 1950 tidak terpakai terhadap perayu kedua memandangkan parang tersebut tidak ditemui hasil pandu arah perayu kedua tetapi dijumpai oleh SP15 di bawah katil SP12. Tambahan pula, analisa DNA yang dijalankan terhadap parang tersebut tidak menemui kesan DNA perayu-perayu mahupun si mati. Selanjutnya, penolakan masuk rakaman video sebagai ekshibit atas alasan rakaman tersebut adalah tidak jelas serta tidak dihantar untuk analisa forensik bagi menentusahkan keaslian dan ketulenannya adalah berlandaskan undang-undang. Sebaliknya, terdapat keterangan langsung iaitu pengecaman positif oleh saksi-saksi pendakwaan yang menunjukkan penglibatan perayu pertama dan perayu kedua dalam pembunuhan si mati. Maka, isu ini tidak berbangkit sama sekali. Isu-isu yang dibangkitkan oleh perayu pertama dan perayu kedua adalah tidak bermerit sama sekali dan seharusnya ditolak (lihat perenggan 75 & 77–80).

(3) Keterangan DNA hanyalah keterangan sokongan sahaja. Ketiadaan kesan DNA pada barang-barang kes tidak menjejaskan keterangan langsung kes yang berlandas kepada keterangan saksi-saksi mata yang mengenali dan mengecam perayu ketiga ketika menyaksikan kejadian pembunuhan si mati tersebut. Isu-isu yang dibangkitkan oleh perayu ketiga adalah tidak bermerit dan seharusnya ditolak (lihat perenggan 82 & 85).

(4) Kegagalan untuk mematuhi keperluan di bawah s 402A Kanun Tatacara Jenayah akan mengakibatkan sebarang keterangan yang menyokong

pembelaan alibi ditolak oleh mahkamah. Kegagalan peguambela asal perayu keempat untuk mengemukakan notis alibi di dalam kes ini tidak terjumlah kepada suatu 'flagrant incompetence' dan tidak mengakibatkan kegagalan keadilan kepada perayu keempat. Perayu keempat telah dicamkan dengan positif oleh saksi-saksi pendakwaan, dan kualiti pengecaman adalah kukuh. Maka pembelaan alibi perayu keempat tidak boleh mengatasi keterangan pengecaman yang positif dan kukuh oleh saksi-saksi pendakwaan tersebut. Perayu keempat tidak diprejudiskan sehingga menyebabkan berlakunya kegagalan keadilan apabila peguambela asalnya tidak mengemukakan notis alibi ketika perbicaraan di hadapan hakim bicara. Seterusnya, tiada salah arah dilakukan oleh hakim bicara berkenaan keputusannya yang menolak kemasukan rakaman video sebagai ekshibit memandangkan rakaman tersebut tidak dihantar untuk analisa forensik bagi menentusahkan keaslian dan ketulenannya. Tiada salah arah dilakukan oleh hakim bicara berkenaan keputusannya tersebut. Isu-isu yang dibangkitkan oleh perayu keempat adalah tidak bermerit (lihat perenggan 87, 92 & 99–101).

(5) Hakim bicara telah menimbangkan keseluruhan fakta kejadian kes dan peranan perayu kelima dalam kejadian tersebut sebelum merumuskan bahawa perayu kelima juga mempunyai niat bersama perayu-perayu yang lain untuk menyebabkan kematian si mati. Selanjutnya, SP2 tidak menyatakan dengan khusus bahawa kesan bencana tubuh badan kepada si mati tersebut adalah 'mencukupi pada lazimnya untuk menyebabkan kematian'. Namun begitu, apa yang perlu dipertimbangkan bukanlah ungkapan perkataan tersebut secara khusus di dalam keterangan SP2, tetapi sama ada terdapatnya keterangan terutamanya dari sudut perubatan untuk membantu mahkamah membuat kesimpulan bagi mencapai maksud ungkapan tersebut. SP2 berpendapat bahawa luka tetakan berganda di kepala si mati telah menyebabkan kematiannya. Keterangan SP2 adalah konsisten dengan versi saksi pendakwaan yang melihat si mati ditetak bertubi-tubi dengan menggunakan parang. Kesan bencana tubuh badan kepada si mati tersebut adalah 'mencukupi pada lazimnya untuk menyebabkan kematian' seperti yang dinyatakan di bawah s 300(c) KK. Isu-isu yang dibangkitkan oleh perayu kelima adalah tidak bermerit dan haruslah ditolak (lihat perenggan 103, 107, 110–112 & 114).

[English summary

The appellants were accused in the High Court under s 302 of the Penal Code ('the PC') read together with s 34 of the PC for killing Pachaippan @ Arasu a/l Arimuthu ('the deceased') on 22 November 2014 at approximately 2.30am to 3.30am at the roadside area, Jalan Bendera 13, Taman Bukit Bendera, 28400 Mentakab, Pahang. On the night of the incident, Gan Irroshini ('SP18') was upstairs in his father's shop, Gan Tiong Hock ('SP20') while SP20 together

with Chong Choon Hau ('SP19'), Alakiri Swamy Nathan ('SP21'), Gan Soo Lee and the deceased, as well as a group of teenagers who were members of the 'Siva Gang' were enjoying a barbecue at the ground floor of the house. After hearing a noise at the ground floor of the house, SP18 looked down through the window and saw some people he knew as Chinniah and Siva Polis, as well as an unknown Indian man, had got out of a car. SP18 saw a verbal argument between Chinniah and Siva Polis on one side, and SP20, the deceased and Mahendran who was SP20's younger brother, on the other. Later, Chinniah, Siva Polis and the unknown Indian man left the house. Not long after, the three of them returned to the house with about 20 other people, including those known as Mohanna (Morgan), Ravi and Shamugan who were members of the 'Mohana Gang'. SP18 saw the throwing of pallet wood, stones and iron towards SP20's house. The Siva Gang responded by throwing the items back and splashing hot water on the Mohana Gang causing them to retreat to the intersection at the end of the road. SP18 recorded the incident that happened that night from the top floor of SP20's house. After stopping recording the video, SP18 went down to the ground floor of the house to close the 'shutter' and then crossed the road to go to his neighbour's house, Vehtavalli a/p Sewaras ('SD9'). SP18 continued to record video from his neighbor's house. Then, SP18 saw Mohana's Gang growing in number and they had moved closer to SP20's house. SP18 could see the fourth appellant slashed the back of the deceased's right shoulder with a machete on the ground floor of SP20's house. The deceased ran towards his motorcycle in the garbage bin area before falling on his back due to hitting the clothesline iron. After that, the deceased was slashed by the second, third and fourth appellants using a machete. The first appellant walked slowly while dragging and stomping his machete on the ground. The fifth appellant pulled the deceased's motorcycle, pushed it on the deceased's body and threw something at the motorcycle causing sparks and burned. SP19 instead had returned to his house when the Mohana Gang retreated to the intersection. After the Mohana Gang returned to SP20's house, SP19 saw the fourth appellant coming and slashing the upper back of the deceased's body with a machete. Then, the deceased backed away, went off the fence, hit the clothesline pole and fell on his back. At that time, SP19 saw the first, second, third and fourth appellants slashing the deceased with a machete. The fifth appellant took a motorcycle and slammed it on the deceased's body and then set the motorcycle on fire. According to SP21, he could see the second, third and fourth appellants slashing the deceased with a machete. At that time, all five appellants were seen to be in the same place. After the appellants left the scene, SP21 and a friend took the deceased to Mentakab Hospital. SP16 was the police officer who arrested the second, third, fourth and fifth appellants. The second appellant had driven SP16 to the house of Ravindran a/l Valayuthan ('SP12'). There, SP12 admitted that the second appellant had handed him a machete which had been placed under the aquarium outside the house but the machete had disappeared. Before leaving, SP16 asked Sivakami a/p Arumugam ('SP15') to contact him if the machete

had been found. Shortly afterwards, SP15 contacted SP16 again informing them that three machete blades had been found under SP12's bed and had been confiscated. The forensic medical expert ('SP2') conducted an autopsy on the deceased's body and confirmed that the cause of death was multiple slash wounds to the head. At the end of the prosecution case, the trial judge found that the prosecution had succeeded in proving a prima facie case against the appellants and ordered them to defend themselves. SD9 and Vanishree a/p Gunaseelan ('SD10') were called to corroborate the testimony of the appellants that they did not slash the deceased with a machete. SD9 and SD10 claimed that a man wearing a checkered shirt had slashed the deceased, identification was made against him through video recording. At the end of the defence case, the trial judge found that the appellants had failed to raise reasonable doubt against the prosecution's case and the prosecution had succeeded in proving the case beyond reasonable doubt against the appellants. Therefore, the appellants were found guilty by the trial judge, convicted of the charges, and sentenced to be hanged by the neck until death. Hence, this appeal.

Held, dismissing the appellants' appeal:

(1) The findings of the trial judge were supported by the evidence that had been presented before him. Apart from that, the evidence of the case also showed that SP18, SP19 and SP21 already knew the second, third, fourth and fifth appellants before the incident occurred and could identify and tell in detail the involvement of each of them when the incident of the deceased's murder occurred. Although the trial judge did not specifically refer to the 'Turnbull Guidelines' and did not warn himself of the danger of conviction on the appellants' identification evidence alone in his reasons for judgment, the trial judge accepted evidence SP18, SP19 and SP21 after considering the quality of their identification evidence carefully and thoroughly. Therefore, no miscarriage of justice had occurred against the appellants and no misdirection was committed by the trial judge in his findings. Secondly, the identification parade report was only corroborative evidence and the substantive evidence was the identification of prosecution witnesses against the appellants in court. The absence of an identification parade report did not affect the prosecution's case at all. Third, the discrepancies in the testimony of SP18, SP19 and SP21 raised by the appellants were minor and immaterial. The contradictions arose as a result of the difference in the point of view of the witnesses who saw the incident. Their testimony was consistent and uncontradicted regarding the essential essence of the case against the appellants. This showed that the witnesses were telling the truth and had not been taught to give evidence. The existence of contradictions in the testimony of SP18, SP19 and SP21 did not weaken the credibility of SP18, SP19 and SP21. Finally, the trial judge had

carefully and comprehensively considered the issue of the credibility of the testimony of SP18, SP19 and SP21 before accepting their testimony. The trial judge had also considered the issue of the reliability of SD9 and SD10's testimony carefully and comprehensively before rejecting their testimony. The trial judge was not misguided in considering the testimony of SP18, SP19, SP21, SD9 and SD10. There was no legal principle that stated that the testimony of an interested witness should be rejected outright by the court. The trial judge who had the audio-visual advantage made a thorough evaluation of the testimony of these witnesses and made a finding of fact that their testimony was consistent and reliable. Therefore, this court as a court that hear appeals should not arbitrarily interfere with the trial judge's findings of fact unless there was a strong reason to do so such as misdirection or etc. The identification evidence of SP18, SP19 and SP21 against the appellants was strong and consistent, and safe to be accepted by the court in convicting them of the charges in this case. There was no merit to the common issues raised by the appellants in this appeal (see paras 41, 43, 45, 47, 50, 53, 55, 61, 66–70 & 72–73).

(2) Section 27 of the Evidence Act 1950 did not apply to the second appellant since the machete was not found as a result of the second appellant's direction but was found by SP15 under SP12's bed. Furthermore, the DNA analysis carried out on the machete did not find traces of the DNA of the appellants or the deceased. Next, the refusal to admit the video recording as an exhibit on the grounds that the recording was unclear and not sent for forensic analysis to verify its authenticity and authenticity was based on the law. On the other hand, there was direct evidence which was positive identification by the prosecution witnesses which showed the involvement of the first appellant and the second appellant in the murder of the deceased. So, this issue did not arise at all. The issues raised by the first appellant and the second appellant were completely without merit and should be dismissed (see paras 75 & 77–80).

(3) DNA evidence was only supporting evidence. The absence of DNA traces on the case items did not affect the direct evidence of the case which was based on the testimony of eyewitnesses who recognised and identified the third appellant when they witnessed the murder of the deceased. The issues raised by the third appellant were without merit and should be dismissed (see paras 82 & 85).

(4) Failure to comply with the requirements under s 402A of the Criminal Procedure Code would result in any evidence in support of the alibi defence being rejected by the court. The failure of the fourth appellant's original defence counsel to submit an alibi notice in this case did not amount to a 'flagrant incompetence' and did not result in a failure of

justice for the fourth appellant. The fourth appellant was positively identified by prosecution witnesses, and the quality of the identification was strong. Therefore, the fourth appellant's alibi defence could not overcome the positive and strong identification evidence by the prosecution witnesses. The fourth appellant was not prejudiced so as to cause a miscarriage of justice when his original defence counsel did not submit a notice of alibi during the trial before the trial judge. Next, there was no misdirection by the trial judge regarding his decision to reject the admission of the video recording as an exhibit since the recording was not sent for forensic analysis to verify its authenticity and authenticity. There was no misdirection by the trial judge regarding his decision. The issues raised by the fourth appellant were without merit (see paras 87, 92 & 99–101).

(5) The trial judge had considered the entire facts of the case and the role of the fifth appellant in the incident before concluding that the fifth appellant also had the intention with the other appellants to cause the death of the deceased. Furthermore, SP2 did not specifically state that the effect of the physical disaster on the deceased was 'sufficient in the ordinary course of nature to cause death'. However, what needed to be considered was not the expression of the word specifically in SP2's testimony, but whether there was evidence especially from a medical point of view to help the court draw a conclusion to reach the meaning of the expression. SP2 opined that the double slash wound on the deceased's head caused his death. SP2's testimony was consistent with the version of the prosecution witness who saw the deceased being slashed repeatedly with a machete. The effect of the bodily injury on the deceased was 'sufficient in the ordinary course of nature to cause death' as stated under s 300(c) of the PC. The issues raised by the fifth appellant were without merit and should be rejected (see paras 103, 107, 110–112 & 114).]

Kes-kes yang dirujuk

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP [1987] 2 MLJ 336; [1987] CLJ Rep 241, MA (dirujuk)

Arumugam s/o Muthusamy v PP [1998] 3 MLJ 73; [1998] 3 CLJ 597, MP (dirujuk)

Balasingham v PP [1959] 1 MLJ 193 (dirujuk)

Chandran a/l Paskaran v PP [2011] 3 MLJ 731; [2011] 2 CLJ 585, MR (dirujuk)

Chean Siong Guat v PP [1969] 2 MLJ 63, MT (diikut)

Chew Wai Keong & Anor v PP and another appeal [2018] 3 MLJ 549; [2018] 3 CLJ 681, MP (dirujuk)

Davendar Singh a/l Sher Singh v Pendakwa Raya [2012] MLJU 321; [2012] 1 LNS 261, MR (dirujuk)

Duis Akim & Ors v PP [2014] 1 MLJ 49; [2013] 9 CLJ 692, MP (dirujuk)

A *Hoo Ah Tee v PP* [2013] 4 MLJ 636; [2013] 4 CLJ 228, MR (dirujuk)
Hussin bin Sillit v PP [1988] 2 MLJ 232; [1988] 1 CLJ Rep 128, MP (diikut)
Ku Lip See v PP [1982] 1 MLJ 194; [1981] 1 LNS 155, MP (dirujuk)
Lim Tiong Seng and Anor v Pendakwa Raya [2010] MLJU 1652; [2011] 5 CLJ 1, MR (diikut)
B *Mazlan bin Othman v Pendakwa Raya* [2012] MLJU 1786; [2013] 1 CLJ 750, MR (dirujuk)
Mohd Khayry bin Ismail v PP [2014] 4 MLJ 317; [2014] 1 LNS 412, MR (dirujuk)
C *Mohd Shawal bin Abdullah v Pendakwa Raya* (Rayuan Jenayah K-OS(M)-160–04 Tahun 2016) (tidak dilaporkan), MR (dirujuk)
Ong Teng For & Anor v PP [2012] 2 MLJ 666; [2013] 1 CLJ 39, MR (diikut)
PP v Dato' Mokhtar Hashim & Ors [1983] CLJ Rep 721, MT (dirujuk)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15; [1976] 1 LNS 184 (diikut)
D *PP v Ebrahim Mirzaie Hj Ebrahim Deh Mokhtar* [2017] 3 MLJ 827; [2017] 1 CLJ 575, MR (dirujuk)
Pendakwa Raya v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560; [1997] 1 CLJ 233, MP (dirujuk)
E *Pendakwa Raya v Nirmala a/p Subramaniam & Ors* [2017] MLJU 567; [2017] 1 LNS 537, MR (dirujuk)
Pie bin Chin v PP [1985] 1 MLJ 234, MT (diikut)
Puganeswaran a/l Ganesan & Ors v PP and other appeals [2020] 12 MLJ 165; [2020] 9 CLJ 326, MP (diikut)
F *Shamim Reza bin Abdul Samad v PP* [2009] 2 MLJ 506; [2009] 6 CLJ 93, MR (dirujuk)
Yahya Hussein Mohsen Abdulrab v PP [2021] 5 MLJ 811; [2021] 9 CLJ 414, MP (diikut)
G *Zulkiple bin Mohamad v PP* [2022] 1 MLJ 479; [2022] 1 CLJ 673, MP (dirujuk)
Vasan Singh v PP [1988] 3 MLJ 412; [1989] 1 CLJ Rep 166, MA (dirujuk)

Undang-undang yang dirujuk

H Akta Keterangan 1950 s 27
Kanun Keseksaan ss 34, 300(a), (b), (c), (d), 302
Kanun Tatacara Jenayah s 402A

I **Rayuan daripada**: Perbicaraan Jenayah No 45B-02–07 Tahun 2015, 45B-03–07 Tahun 2015 dan 45B-04–07 Tahun 2015 (Mahkamah Tinggi, Temerloh)

Amy Chong (Goh Chee Kian bersamanya) (Paul, Amy Chong & Assoc) dalam Rayuan Jenayah No C-05(M)-128–03 Tahun 2019 dan C-05(M)-129–03 Tahun 2019 bagi pihak perayu pertama dan kedua.

Rajesh Nagarajah (Raj & Sach) dalam Rayuan Jenayah No C-05(M)-130–03 Tahun 2019 bagi pihak perayu ketiga.
K Kumarandran (Dev Kumarandran, Teh See Khoon dan Yaw Xinying bersamanya) (Kumar & Co) dalam Rayuan Jenayah No C-05(M)-131–03 Tahun 2019 bagi pihak perayu keempat.
Rajpal Singh dalam Rayuan Jenayah No C-05(M)-132–03 Tahun 2019 (Tiew Poh Nee bersamanya) (Rajpal, Firah & Vishnu) bagi pihak perayu kelima.
Abdul Ghafar bin Ab Latif (Aida Khairuleen bt Azli bersamanya) (Timbalan Pendakwa Raya, Jabatan Peguam Negara) bagi pihak responden.

Hashim Hamzah HMR:

PENGENALAN

[1] Perayu-perayu dalam kes ini telah dituduh di Mahkamah Tinggi Temerloh, Pahang dibawah s 302 Kanun Keseksaan dibaca bersama s 34 Kanun Keseksaan. Mereka telah dituduh membunuh Pachaippan @ Arasu a/l Arimuthu (No K/P 711228–06–5427) ('si mati'). Kejadian dikatakan berlaku pada 22 November 2014 jam lebih kurang 2.30 pagi hingga 3.30 pagi di kawasan tepi jalan, Jalan Bendera 13, Taman Bukit Bendera, 28400 Mentakab, Pahang.

[2] Perayu-perayu mengaku tidak bersalah terhadap pertuduhan mereka masing-masing dan memohon untuk dibicarakan. Suatu perbicaraan bersama telah dijalankan di hadapan hakim bicara.

[3] Bagi kemudahan alasan ini, perayu-perayu akan dirujuk seperti berikut, perayu Saimon a/l Anthony akan dirujuk sebagai perayu pertama, perayu Suthakar a/l Sivakumar akan dirujuk sebagai perayu kedua, perayu Sivachandran a/l S Jayarajah akan dirujuk sebagai perayu ketiga, perayu Thiyagu a/l Balakrishnan akan dirujuk sebagai perayu keempat dan terakhir, perayu Sundramoorthi a/l Sukumare akan dirujuk sebagai perayu kelima.

KES PENDAKWAAN

[4] Keterangan kes pendakwaan telah dikupas dengan rapi dan terperinci oleh hakim bicara. Bagi tujuan rayuan ini, keterangan kes pendakwaan dapat diringkaskan seperti berikut.

[5] Pada malam kejadian, Gan Irroshini ('SP18') berada di tingkat atas rumah kedai ayahnya, Gan Tiong Hock ('SP20') manakala SP20 bersama-sama Chong Choon Hau ('SP19'), Alakiri Swamy Nathan ('SP21'), Gan Soo Lee dan si mati, serta sekumpulan remaja iaitu Ranjit, Dharma,

Seelan, Kombi dan Kovalan yang merupakan ahli kumpulan 'Geng Siva' sedang menikmati barbeku di tingkat bawah rumah tersebut.

[6] Setelah mendengar bunyi bising di tingkat bawah rumah, SP18 telah melihat ke bawah melalui tingkap dan melihat beberapa orang yang dikenalinya sebagai Chinniah dan Siva Polis, serta seorang lelaki berbangsa India yang tidak dikenali, telah keluar dari sebuah kereta Proton Iswara berwarna merah. SP18 melihat berlakunya pertengkaran mulut di antara Chinniah dan Siva Polis di satu pihak, dan SP20, si mati dan Mahendran, iaitu adik SP20, di satu pihak yang lain. SP18 kemudian melihat Mahendran menampar lelaki berbangsa India yang tidak dikenali tersebut dan mendengar SP20 mengatakan jangan datang balik. Kemudian, Chinniah, Siva Polis dan seorang lelaki berbangsa India yang tidak dikenali tersebut telah beredar dari rumah tersebut.

[7] Tidak lama kemudian, ketiga-tiga mereka telah kembali ke rumah tersebut bersama lebih kurang 20 orang yang lain, termasuklah yang dikenali sebagai Mohanna (Morgan), Ravi dan Shamugan yang merupakan ahli 'Geng Mohana'. SP18 melihat berlakunya baling membaling kayu palet, batu dan besi ke arah rumah SP20. Geng Siva pula membalas dengan membaling semula barang-barang tersebut serta menyimbah air panas ke arah Geng Mohana menyebabkan mereka berundur ke persimpangan di hujung jalan.

[8] SP18 telah merakamkan insiden yang berlaku pada malam tersebut dari tingkat atas rumah SP20 (*Folder* 1). Setelah berhenti merakam video, SP18 telah turun ke tingkat bawah rumah untuk menutup 'shutter' dan kemudiannya menyeberang jalan untuk pergi ke rumah jirannya, Vehtavalli a/p Sewaras ('509'). SP18 sambung merakam video dari rumah jirannya tersebut (*Folder* 2). Kedua-dua rakaman video tersebut menjadi pertikaian pihak-pihak dalam rayuan ini dan isu ini akan dibincangkan kemudian.

[9] Pada ketika itu, SP18 terlihat sebuah kereta peronda polis tiba di tempat kejadian. Seorang anggota polis telah keluar dari kereta tersebut dan bercakap dengan Mahendran dan kemudiannya beredar dari tempat kejadian. Kemudian, SP18 melihat Geng Mohana semakin ramai dan mereka membawa senjata seperti besi dan parang. SP18 melihat perayu pertama mendekati rumah SP20 dan bercakap dengan Mahendran dalam nada yang kuat bertanyakan dalam Bahasa Tamil 'Siapa you punya orang in charge? Panggil dia!'. Selepas itu, perayu pertama kembali ke kilang aiskrim di mana ahli kumpulannya berada.

[10] Dari sana, Geng Mohana telah bergerak menghampiri rumah SP20. SP18 melihat perayu kedua dan perayu kelima membuka baju mereka dan menutup sebahagian muka mereka dengan baju tersebut. Perayu kelima dilihat

membaling botol kaca yang berapi ke arah tingkat bawah rumah SP20. SP18 kemudian bergerak turun dari tembok dan masuk semula ke dalam rumah SD9 setelah melihat perayu pertama berjalan ke arahnya dengan muka yang garang.

[11] Melalui pintu gelangsar rumah SD9, SP18 dapat melihat perayu keempat menetak bahagian belakang bahu kanan si mati dengan menggunakan parang. Si mati pada ketika itu sedang memeluk pagar di tingkat bawah rumah SP20. Kemudian, si mati telah berlari ke arah motosikalnya di kawasan tong sampah sebelum jatuh terlentang akibat terlanggar besi ampaian. Selepas itu, si mati telah ditetak oleh perayu kedua, ketiga dan keempat dengan menggunakan parang. Perayu pertama pula berjalan perlahan-lahan sambil menyeret dan menghentak parangnya ke atas tanah sambil menjerit 'Siapa lagi? Siapa lagi?'. Perayu kelima pula telah menarik motosikal si mati, menolaknya ke atas badan si mati dan membaling sesuatu ke arah motosikal tersebut sehingga mengakibatkan percikan api dan terbakar.

[12] SP18 dapat mengecam kesemua perayu sewaktu perbicaraan di mahkamah. SP18 boleh mengecam perayu pertama kerana melihat perayu pertama beberapa kali pada malam kejadian. SP18 pula mengenali perayu kedua, ketiga, keempat dan kelima yang merupakan orang tempatan.

[13] SP19 merupakan jiran SP18. SP19 tinggal di rumah No 53. SP19 merupakan seorang guru. SP19 menyatakan bahawa pada malam kejadian, ketika sedang makan di rumah SP20, SP19 terdengar bunyi bising di luar rumah. SP19 keluar untuk melihat dan mendapati sebuah kereta Proton Iswara berwarna merah telah kemek. SP19 masuk semula ke dalam rumah untuk makan dan terdengar semula bunyi bising di luar rumah. Apabila SP19 keluar semula untuk lihat apa yang berlaku, SP19 terlihat berlakunya insiden baling membaling kayu palet, batu, peralatan dapur dan simbahan air panas di antara Geng Mohana dan Geng Siva.

[14] Setelah Geng Mohana berundur ke persimpangan jalan, SP19 telah pulang ke rumahnya. SP19 berada di kawasan anjung rumahnya dan melihat seramai lebih kurang 70 ke 80 orang Geng Mohana sudah berkumpul berdekatan kilang aiskrim. SP19 juga dapat melihat kelibat beberapa ahli kumpulan Geng Mohana tersebut yang memegang senjata parang yang panjang dan berkilat. Kejadian baling membaling barang dan simbahan air panas berlaku semula. SP19 mengesahkan ada melihat SP18 berada di atas tembok di luar rumah SD9.

[15] Sewaktu Geng Mohana mendekati rumah SP20, SP19 melihat perayu kelima membaling sebuah botol berapi ke dalam rumah SP20 menyebabkan berlakunya kebakaran. Selepas itu, SP19 melihat perayu keempat datang dan

menetak bahagian belakang atas badan si mati dengan parang. Si mati ketika itu berada di pintu pagar rumah SP20. Kemudian, si mati telah berundur, beredar dari pagar, terlanggar tiang ampaian dan jatuh terlentang. Pada waktu itu, SP19 melihat perayu pertama, kedua, ketiga dan keempat menetak si mati dengan menggunakan parang. perayu kelima telah mengambil sebuah motosikal dan menghempapnya di atas badan si mati dan kemudiannya membakar motosikal tersebut.

[16] SP19 mengecam kesemua perayu sewaktu perbicaraan di mahkamah. SP19 menyatakan bahawa dia dapat melihat kesemua wajah perayu dibantu oleh cahaya lampu jalan, lampu rumah dan cahaya dari api yang marak di rumah SP20. SP19 juga pernah melihat perayu kedua, ketiga dan kelima kerana mereka merupakan orang tempatan. SP19 turut mengenali perayu keempat yang kerap ke rumah bersebelahan rumahnya untuk menziarahi datuk dan neneknya yang menetap di situ.

[17] SP21 menyatakan bahawa pergaduhan pada malam kejadian tersebut berlaku beberapa kali. Menurut SP21, pergaduhan pertama berlaku semasa Chinniah datang dengan sebuah kereta Proton Iswara berwarna merah. SP21 mengakui bahawa dirinya sendiri bersama Mahendran dan kawan-kawannya yang lain telah merosakkan kereta tersebut. Selepas itu, Chinniah telah berkumpul dengan Geng Mohana yang semakin bertambah bilangan mereka di kawasan berdekatan kilang aiskrim. Kemudian, Geng Mohana telah mara ke tempat kejadian dengan membaling kayu palet, batu dan besi manakala Geng Siva membalas dengan membaling semula barang-barang tersebut dan menyimbah air panas sehingga mengakibatkan Geng Mohana berundur ke persimpangan jalan. Pada ketika itu, pihak polis tiba di tempat kejadian dan keadaan menjadi reda.

[18] Tidak lama kemudian, Geng Mohana telah bergerak semula ke rumah SP20 dan kali ini terdapat ahli kumpulan tersebut yang membawa parang menyebabkan beberapa orang ahli kumpulan Geng Siva bertindak melarikan diri.

[19] Pada waktu itu, si mati yang berada di luar rumah telah diserang oleh perayu-perayu dengan menggunakan parang. SP21 telah melarikan diri dan masuk ke dalam rumah SD9. SP21 melihat SP18, kawan-kawannya iaitu Dinesh, Kombi dan SD9 serta anak-anaknya sedang berdiri di pintu gelangsar hadapan rumah SD9 menghadap ke rumah SP20. SP21 berada bersama-sama mereka dan melihat dari pintu gelangsar tersebut. SP21 dapat melihat perayu kedua, ketiga dan keempat menetak si mati dengan menggunakan parang. Pada waktu itu juga kelima-lima perayu dilihat berada di tempat yang sama. Selepas perayu-perayu beredar dari tempat kejadian, SP21 telah keluar dari rumah SD9 bersama yang lain. Tidak lama kemudian, kawan-kawannya iaitu

Ariavan, Pavitheran dan Nishalan tiba di tempat kejadian dengan menaiki kereta Perodua Myvi. SP21 dan Ariavan telah membawa si mati ke Hospital Mentakab.

[20] SP21 dapat mengecam kesemua perayu sewaktu perbicaraan di mahkamah. SP21 juga dapat menceritakan dengan terperinci peranan setiap perayu, bentuk fizikal dan pakaian mereka pada malam kejadian. SP21 juga mengenali perayu kedua selama lima ke enam tahun sebelum kejadian manakala perayu ketiga dikenalinya sejak 13 tahun sebelum kejadian. SP21 juga sudah mengenali perayu keempat dan bapanya sebelum ini.

[21] Gan Teng Hock ('SP20') mengesahkan bahawa kejadian tersebut berlaku di rumahnya. SP20 menyatakan bahawa pada malam tersebut, terdapat jamuan barbeku di rumahnya. Kawan-kawan SP20 dan anaknya SP18 berkumpul untuk makan bersama di rumahnya. Kemudian, SP20 telah didatangi oleh Chinniah, Narasi, Siva Polis dan seorang lelaki berbangsa India yang menaiki sebuah kereta Proton Iswara berwarna merah, manakala perayu kedua dan ketiga telah datang menaiki motosikal. Berlaku pertengkaran mulut di antara kesemua mereka. SP20 menyatakan bahawa sewaktu pertengkaran berlaku, Mahendran telah memecahkan kereta Chinniah dan si mati telah menampar Chinniah.

[22] Apabila kejadian yang pertama tersebut berakhir, SP20 telah pergi ke Balai Polis Temerloh untuk membuat laporan polis. Oleh itu, SP20 tidak melihat kejadian yang menimpa si mati.

[23] ASP Ar Masri bin Sallehudin ('SP16') merupakan pegawai polis yang telah menangkap perayu kedua, ketiga, keempat dan kelima. SP16 telah menjalankan soal siasat ke atas perayu kedua dan perayu kedua menyatakan bahawa senjata yang digunakan pada malam kejadian telah disembunyikan di rumah kawannya di Taman Rimba. SP16 telah merekodkan maklumat yang diberikan oleh perayu kedua di dalam eksh P179. Perayu kedua telah memandu arah SP16 ke rumah Ravindran a/l Valayuthan ('SP12'). Di sana, SP12 mengakui bahawa perayu kedua ada menyerahkan parang kepadanya yang telah diletakkan di bawah akuarium di luar rumah tetapi parang tersebut telah hilang. SP16 telah membuat pemeriksaan rambang dan beredar ke rumah perayu kedua untuk merampas pakaian. Sebelum beredar, SP16 meminta Sivakami a/p Arumugam ('SP15') untuk menghubunginya jika parang tersebut telah dijumpai. Tidak lama kemudian, SP15 telah menghubungi SP16 semula memaklumkan bahawa tiga bilah parang telah dijumpai di bawah katil SP12 dan telah dirampas.

[24] SP12 menyatakan bahawa pada 23 November 2014 jam lebih kurang 2 malam ketika dalam perjalanan pulang ke rumahnya, perayu kedua

menelefonnya untuk memulangkan peralatan kereta yang dipinjamnya. Setelah tiba di rumah, SP12 mendapati terdapat peralatan kereta dan tiga bilah parang yang diletak berhampiran akuarium di anjung rumah tersebut. Perayu kedua meminta SP12 menyimpannya. SP12 kemudian menyimpan parang-parang tersebut di bawah katil di dalam biliknya.

[25] Pakar Perubatan Forensik, Dr Sri Marni bt Zainal Abidin ('SP2') telah menjalankan bedah siasat ke atas mayat si mati dan mengesahkan bahawa punca kematian si mati adalah luka tetak berganda di bahagian kepalanya (*multiple slash wounds to the head*). Menurut SP2, terdapat lima luka tetakan di bahagian kepala yang menyebabkan pendarahan kulit kepala, keretakan tulang tengkorak, pendarahan dalam kepala dan kecederaan otak si mati. Menurut SP2 lagi, kehilangan darah yang banyak boleh berlaku daripada kecederaan pada kulit kepala lalu menyebabkan pengaliran darah ke organ-organ lain seperti jantung dan otak juga terganggu. Pendarahan dalam kepala dan kecederaan otak juga boleh mengganggu tahap kesedaran si mati dan boleh juga menyebabkan kematian. SP2 juga mengesahkan bahawa kematian si mati tidak diakibatkan oleh penyakit atau lain-lain. SP2 juga mengesahkan bahawa kecederaan di bahagian kepala yang berkait dengan keretakan tulang tengkorak dan kecederaan otak adalah disebabkan oleh trauma daya objek tajam (*sharp force trauma*) dan kecederaan pada bahagian muka, leher, perut, bahagian atas dan bawah badan adalah konsisten dengan trauma daya objek tajam atau objek tumpul. Kecederaan-kecederaan tersebut boleh diakibatkan oleh objek seperti parang. SP2 juga menyatakan terdapat kecederaan di bahagian kepala dan badan si mati yang konsisten dengan kebakaran.

DAPATAN HAKIM BICARA DI AKHIR KES PENDAKWAAN

[26] Di akhir kes pendakwaan, hakim bicara mendapati bahawa pihak pendakwaan telah berjaya membuktikan kes prima facie terhadap perayu-perayu dan mengarahkan mereka untuk membela diri.

KES PEMBELAAN

[27] Di peringkat pembelaan, perayu-perayu telah memilih untuk memberikan keterangan secara bersumpah. Pihak pembelaan telah memanggil seramai sepuluh orang saksi termasuk perayu-perayu sendiri.

[28] Secara ringkasnya, versi pembelaan perayu-perayu adalah seperti berikut.

[29] Perayu-perayu menafikan bahawa mereka telah menetak si mati dengan parang. Mereka mendakwa bahawa orang yang menetak si mati dengan parang adalah seorang yang memakai baju bercorak petak-petak seperti mana dalam

video yang telah dirakam. Perayu pertama mendakwa dia pernah memberitahu 'SM Misai' berkenaan perkara tersebut.

[30] Perayu keempat mendakwa dia tidak berada di tempat kejadian pada waktu kejadian iaitu ketika lelaki yang memakai baju bercorak petak-petak tersebut menetak si mati.

[31] Perayu-perayu turut menafikan bahawa Geng Mahana telah menyerang Geng Siva. Perayu-perayu menyatakan bahawa pada malam kejadian terdapat dua kejadian serangan iaitu serangan di dalam rumah SP20 dan kemudian serangan ke atas si mati selepas ditetak. Serangan di dalam rurnah SP20 dibuat oleh kumpulan lain yang terdiri daripada 4–5 orang di mana mereka melihat si mati telah keluar dari rumah SP20 dalam keadaan berdarah dan kemudian ditetak oleh lelaki yang memakai baju bercorak petak-petak tersebut di bahagian kepala. Selepas itu, kumpulan kedua yang terdiri daripada 4–5 orang telah mengambil dan menghempap motosikal ke atas badan si mati dan membakarnya.

[32] Vehtavalli a/p Sewaras ('SD9') dan Vanishree a/p Gunaseelan ('SD10') telah dipanggil untuk menyokong keterangan perayu-perayu bahawa mereka tidak menetak si mati dengan parang. SD9 dan SD10 mendakwa bahawa lelaki yang memakai baju bercorak petak-petak tersebut yang telah menetak si mati, pengecaman dibuat terhadapnya melalui rakaman video di minit 7.25 ke 7.30 video di dalam *Folder* 2.

DAPATAN HAKIM BICARA DI AKHIR KES PEMBELAAN

[33] Di akhir kes pembelaan, hakim bicara mendapati bahawa perayu-perayu telah gagal untuk menimbulkan keraguan yang munasabah terhadap kes pendakwaan dan pihak pendakwaan telah berjaya membuktikan kes melampaui keraguan munasabah terhadap perayu-perayu.

[34] Maka, perayu-perayu telah didapati bersalah oleh hakim bicara, disabitkan dengan pertuduhan, dan dihukum gantung di leher sehingga mati.

[35] Perayu-perayu telah memfailkan rayuan terhadap keputusan hakim bicara tersebut di mahkamah ini.

ISU BERSAMA PERAYU-PERAYU (*COMMON ISSUE*)

[36] Di hadapan kami, perayu-perayu telah membangkitkan isu bersama iaitu sama ada keterangan pengecaman oleh saksi-saksi pendakwaan iaitu SP18, SP19 dan SP21 adalah selamat untuk diterima oleh mahkamah bagi menyabitkan perayu-perayu dengan kesalahan yang dipertuduhkan.

[37] Kami akan menyentuh isu bersama ini terlebih dahulu sebelum menyentuh isu-isu lain yang dibangkitkan oleh perayu-perayu di dalam rayuan mereka masing-masing.

[38] Pertama sekali, perayu-perayu berhujah bahawa keterangan pengecaman saksi-saksi pendakwaan adalah sangat lemah dan tidak berlandaskan 'Turnbull Guidelines'. Secara ringkasnya, perayu-perayu menyatakan bahawa hakim bicara telah gagal untuk memberikan amaran kepada dirinya sendiri tentang bahayanya mensabitkan perayu-perayu dengan pertuduhan berdasarkan kepada keterangan pengecaman saksi semata-mata. Tambahan pula, perayu-perayu mendakwa kualiti pengecaman adalah lemah, antara lainnya, kerana terlalu ramai orang di tempat kejadian dan pencahayaan yang malap.

[39] Prinsip berkaitan 'Turnbull Guidelines' ini telah dijelaskan oleh Mahkamah Persekutuan dalam kes *Chew Wai Keong & Anor v Public Prosecutor and another appeal* [2018] 3 MLJ 549; [2018] 3 CLJ 681 melalui Aziah Ali HMP (ketika itu) seperti berikut:

> [128] We are mindful that in a case *where the prosecution relied wholly or substantially on the identification of an accused person, the court ought to have in mind the guidelines set out in R v Turnbull and Others* [1976] 3 All ER 549 when assessing the quality of the identification evidence ('the Turnbull guidelines). Lord Widgery CJ (as he then was) speaking for the English Court of Appeal said (p 551):
>
> > First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, *the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications*. In addition he should instruct them as to the reason for the need for such a warning and *should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken ...*
>
> At p 552 the court said:
>
> > Secondly, the judge should direct the jury to *examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? ... Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made*.
>
> The court said further:
>
> > All these matters go to the *quality of the identification evidence*. If the quality is

good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. *In our judgment, when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it*; provided always, however, that an adequate warning has been given about the special need for caution. Were the courts to adjudge otherwise, affronts to justice would frequently occur ...

When, in the judgment of the trial judge, *the quality of the identifying evidence is poor, as for example when it depends on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification* ...

A failure to follow these guidelines is likely to result in a conviction being quashed and will do so if in the judgment of this court on all the evidence the verdict is either unsatisfactory or unsafe.

[40] Berkenaan isu ini, hakim bicara dalam alasan penghakimannya (perenggan 28 hingga 34) telah membuat dapatan faktanya bahawa saksi-saksi pendakwaan iaitu SP18, SP19 dan SP21:

(a) boleh melihat kejadian pergaduhan yang berlaku dan kejadian si mati ditetak kerana tempat kejadian diterangi lampu jalan, cahaya lampu dari dalam dan luar rumah-rumah sekitar taman itu dan api yang marak akibat kebakaran di tingkat bawah rumah SP20;

(b) mempunyai penglihatan yang tidak terhalang ke arah tempat kejadian;

(c) tidak melihat perayu-perayu sekali imbas sahaja tetapi berulang-ulang kali sepanjang kejadian tersebut; dan

(d) dapat menggambarkan kejadian pada malam tersebut dengan terperinci seperti gambaran perayu-perayu, pakaian mereka dan peranan yang dimainkan oleh setiap mereka tanpa sebarang percanggahan keterangan yang material antara mereka.

[41] Setelah meneliti keseluruhan rekod rayuan, kami bersetuju bahawa dapatan hakim bicara di atas adalah disokong oleh keterangan yang telah dikemukakan di hadapannya.

[42] Kami merujuk kepada kes *Duis Akim & Ors v Public Prosecutor* [2014] 1 MLJ 49; [2013] 9 CLJ 692 di mana Mahkamah Persekutuan melalui Richard Malanjum HB (Sabah dan Sarawak) (ketika itu) telah menimbangkan faktor-faktor berikut dalam menentukan sama ada kualiti pengecaman saksi adalah baik, iaitu:

A [49] It should be noted that at the end of the case for the prosecution the learned trial judge ruled that the appellants had been positively identified by PW1. He must have been satisfied with the accuracy and good quality of the identification. He relied on the fact that *PW1 had a good five minutes look at the faces of the appellants* that early morning. PW1 also testified that he *saw the first appellant chasing the* B *deceased* into the store room and after coming out from the store room the *first appellant went on to attack him*.

[50] The other contributing factors to the good quality of the identification of the appellants are these:

C (i) that those who entered the store that early morning *did not wear masks*;

(ii) that the *lighting in the store at that time was bright*;

(iii) that the two persons who pointed parangs on the abdomen of PW1 must have been *very near him*. PW1 gave the length of the parangs to be about a foot (12 inches);

D (iv) that the *view of PW1* on those who entered the store that early morning *was not impeded or obstructed*;

(v) that it was *not a fleeting glance of PW1* (see: *Public Prosecutor v Hanif Basree Abdul Rahman* [2007] 2 MLJ 320; [2007] 2 CLJ 33 *Public Prosecutor* E *v Shafarin bin Zainal Abidin & Anor* [2007] 7 MLJ 474 *Hanafi Mat Hassan v Public Prosecutor* [2006] 4 MLJ 134; [2006] 3 CLJ 269).

(vi) that in his evidence PW1 was positive that the appellants were the ones who came into the store on that fateful early morning. *Under intensive cross-examination PW1 remained steadfast in his answers* on his F identification of the appellants;

(vii) that *being the appellate court we do not think we should interfere with the assessment by the learned trial judge of PW1 as a witness on the issue of identification of the appellants* or overlooked it (see: *Syed Abdullah v Public Prosecutor* [1964] MLJ 48; [1963] 1 LNS 133 *Ye Wei Gen v Public* G *Prosecutor* [1999] 4 SLR 101, at pp 107–108 (HC));

(viii) that PW1 had no reason or motive to simply implicate the appellants; and

(ix) that the IP was also conducted within a month after the incident.

H **[43]** Selain daripada itu juga, keterangan kes ini juga menunjukkan bahawa SP18, SP19 dan SP21 sudah pun mengenali perayu kedua, ketiga, keempat dan kelima sebelum kejadian berlaku dan boleh mengecam serta menceritakan secara terperinci penglibatan setiap seorang daripada mereka sewaktu kejadian pembunuhan si mati berlaku.

I **[44]** Dalam kes *Public Prosecutor v Dato' Mokhtar Hashim & Ors* [1983] CLJ Rep 721 (yang juga telah diiktiraf oleh mahkamah ini dalam kes *Chandran a/l Paskaran v Public Prosecutor* [2011] 3 MLJ 731; [2011] 2 CLJ 585), Hashim Yeop Sani HMT (ketika itu) telah menyatakan seperti berikut:

As regards all these three witnesses *it is important in my opinion to draw a distinction between recognition and identification. Recognition is more reliable than mere identification. Recognition of a person known to the witness would be more reliable than identification by a witness of a stranger*. Some pertinent questions were put by the Lord Chief Justice in the judgment of the Court of Appeal in *Raymond Turnbull & Ors* [1976] 63 Cr App R 132 appearing at p 137 as follows:

> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long had elapsed between the original observation and the subsequent identification to the police?

[45] Selanjutnya, kami berpendapat bahawa walaupun hakim bicara tidak merujuk secara khusus kepada 'Turnbull Guidelines' dan tidak memberikan amaran kepada dirinya berkenaan bahayanya sabitan atas keterangan pengecaman perayu-perayu semata-mata dalam alasan penghakimannya, hakim bicara telah menerima keterangan SP18, SP19 dan SP21 setelah menimbangkan kualiti keterangan pengecaman mereka dengan teliti dan menyeluruh. Oleh itu, tiada sebarang kegagalan keadilan telah berlaku terhadap perayu-perayu.

[46] Dalam kes *Arumugam s/o Muthusamy v Public Prosecutor* [1998] 3 MLJ 73; [1998] 3 CLJ 597, Chong Siew Fai HB (Sabah dan Sarawak, ketika itu) dalam menyampaikan penghakiman Mahkamah Persekutuan telah memutuskan seperti berikut:

As regards the guidelines in R v Turnbull, it would not be right to say that the trial magistrate had totally failed to comply with them. Indeed, in fairness to Mr Karpal Singh acting for the applicant, this was not his contention. As a matter of fact, *the trial magistrate did examine the circumstances in which PW1 and PW2 identified the applicant* on 1 or 2nd April, 1986 eg, the area in that night was bright, that the meeting with the applicant was for some 15 minutes, etc.

The only failure by the trial magistrate, as contended for the applicant, was the administration of caution to herself. In this regard, the guidelines in *R v Turnbull*, stated:

> A failure to follow these guidelines is likely to result in a conviction being quashed and will do so if, in the judgment of this court on all the evidence the verdict is either unsatisfactory or unsafe (p 554C).

In the instant case before us, it would have been prudent to hold an identification parade. However, having regard to the cumulative effect of the evidence of both the prosecution and the defence as a whole, more particularly, the evidence of PW1 and PW2 which both courts below accepted, the supporting evidence respecting, inter

alia, the recovery of the car-key from the applicant, the use of the car by the applicant, the removal of the car from the front of the shop where the applicant lived, as well as the stance of the applicant in his defence, which was an absolute denial, *we see no failure of justice having occasioned nor do we see any ground for contending that the conviction is unsatisfactory or unsafe. This is not a case in which the witness's ability to make identification is in doubt*. We see no reason to interfere with the trial magistrate's finding which was affirmed by the High Court. We are of the unanimous view that on the particular facts and circumstances of this case there had been no miscarriage of justice and that the concurrent findings of the trial magistrate and the High Court ought not be disturbed. We accordingly order the conviction and the 14 months imprisonment sentence do stand.

[47] Maka, berdasarkan kepada kesemua yang telah dinyatakan di atas, kami mendapati tiada salah arah dilakukan oleh hakim bicara dalam dapatannya di atas.

[48] Keduanya, perayu-perayu juga membangkitkan isu bahawa laporan kawad cam yang berkaitan tidak dikemukakan di mahkamah sekaligus menjejaskan keterangan pengecaman SP18, SP19 dan SP21 terhadap perayu-perayu.

[49] Setelah meneliti keseluruhan rekod rayuan termasuklah alasan penghakiman hakim bicara, kami mendapati bahawa isu ini telah pun dibangkitkan di hadapannya. Hakim bicara dalam alasan penghakimannya telah memutuskan seperti berikut:

[36] Kedudukan undang-undang adalah jelas iaitu pengecaman di dalam kandang orang salah merupakan keterangan substantif dan keterangan pengecaman dalam kawad cam merupakan keterangan sokongan, *Lim Tiong Seng and Anor v Pendakwa Raya* [2010] MLJU 1652; [2011] 5 CLJ 1. Seperti yang telah mahkamah huraikan dalam kes ini SP18, SP19 dan SP21 sememangnya telah mengenali OKT2, OKT3, OKT4 dan OKT5 lama sebelum kejadian manakala mereka bukan nampak OKT1 dan OKT-OKT yang lain sekali imbas sahaja tetapi berulang kali pada malam kejadian dengan peranan yang berbeza-beza. Keadaan ini dan dengan bantuan cahaya dari tiang lampu, cahaya dari luar dan dalam rumah di taman dan api yang marak dari bawah kedai SP20 amat membantu SP18, SP19 dan SP21 mengecam OKT1 hingga OKT5. Oleh itu tidak ada isu mengenai kegagalan pihak pendakwa untuk mengemukakan laporan kawad cam seperti yang dibangkitkan oleh peguam bela. Mahkamah tidak boleh mengenepikan keterangan SP18, SP19 dan SP21 berkait dengan pengecaman ke atas kesemua OKT dalam kandang orang salah disebabkan pihak pendakwa tidak mengemukakan laporan kawad cam, *Poovaneswaran a/l Sellan & Anor v Pendakwa Raya* [2016] MLJU 559; [2016] 10 CLJ 508. Pengecaman dalam kawad cam tidak mempunyai independent value langsung. Dengan itu kegagalan pihak pendakwaan untuk mengemukakan laporan kawad cam tidak perlu diberikan keberatan yang berlebihan, *Pendakwa Raya v Nirmala a/p Subramaniam & Ors* [2017] MLJU 567; [2017] 1 LNS 537.

[50] Berkenaan isu ini kami bersetuju sepenuhnya dengan hakim bicara bahawa laporan kawad cam hanyalah bersifat keterangan sokongan (*corroborative evidence*) sahaja dan keterangan substantif adalah keterangan pengecaman saksi-saksi pendakwaan terhadap perayu-perayu di mahkamah.

[51] Kami bersetuju dengan apa yang telah dinyatakan oleh Ahmad Maarop HMR (ketika itu) dalam kes *Lim Tiong Seng and Anor v Pendakwa Raya* [2010] MLJU 1652; [2011] 5 CLJ 1 ketika menyampaikan penghakiman mahkamah ini seperti berikut:

> [21] Kedudukan undang-undang tentang pengecaman adalah jelas. Keterangan substantif adalah pengecaman ke atas orang kena tuduh sebagai orang yang telah melakukan kesalahan oleh saksi-saksi dalam mahkamah semasa perbicaraan. Keterangan pengecaman dalam kawad cam adalah relevan dan boleh digunakan sebagai keterangan sokongan kepada keterangan substantif yang dinyatakan tadi (lihat *Budhsen v State of UP* [1970] Cri LJ 1149, *Malkhansingh & Ors vs State Of Madhya Pradesh* [2003] Cr LJ 3535 SC, *Vaikuntam Chandrappa v State of AP* [1960] Cri LJ 1681, *Arumugam s/o Muthusamy v Public Prosecutor* [1998] 3 MLJ 73; [1998] 3 CLJ 597).

[52] Dalam kes *Pendakwa Raya v Nirmala a/p Subramaniam & Ors* [2017] MLJU 567; [2017] 1 LNS 537, mahkamah ini melalui Ahmadi Haji Asnawi HMR telah menyatakan bahawa:

> [96] Ketiadaan Laporan Kawad Cam tidak memprejudiskan OKT-OKT kerana evidential value laporan tersebut hanyalah berbentuk corroborative sahaja. Keterangan substantive datang dari keterangan lisan SP14 dan SP15. Maka seharusnya pihak pembelaan menggunakan peluang dengan sebaik-baiknya untuk elicit keterangan yang berpihak kepada OKT-OKT dari kehadiran SP14 dan SP15 dalam kandang saksi dan tidak merengek-rengek meminta salinan Laporan Kawad Cam tersebut.
>
> [97] Selanjutnya seperti dinyatakan di atas, keterangan kawad cam bukanlah keterangan *substantive*. Ia hanya boleh digunakan untuk menyokong (*corroborate*) keterangan *substantive* yang diberikan oleh saksi-saksi berkaitan dengan pengecaman atau identiti orang kena tuduh sebagai pelaku kesalahan. Tambahan pula, pengecaman dalam kawad cam tidak mempunyai *independent value* langsung lihat *ST Shind* dan *Arumugam s/o Muthusamy*. Dengan itu kegagalan pihak pendakwaan untuk mengemukakan Laporan Kawad Cam tidak perlu diberikan keberatan yang berlebihan (*exaggerated importance*).

[53] Oleh itu, kami berpendapat bahawa ketiadaan laporan kawad cam, seperti yang dihujahkan oleh perayu-perayu, langsung tidak menjejaskan kes pendakwaan.

[54] Isu ketiga yang dibangkitkan oleh perayu-perayu adalah terdapatnya beberapa percanggahan dalam keterangan SP18, SP19 dan SP21 yang menunjukkan bahawa saksi-saksi pendakwaan tersebut tidak boleh dipercayai.

[55] Setelah meneliti percanggahan-percanggahan yang dibangkitkan oleh perayu-perayu dalam hujahan mereka dan menyemak keseluruhan rekod rayuan, kami mendapati bahawa percanggahan-percanggahan yang dibangkitkan oleh perayu-perayu adalah minor dan tidak material. Pada hemat kami, percanggahan-percanggahan tersebut timbul akibat daripada perbezaan sudut pandangan saksi-saksi yang melihat kejadian tersebut. Saksi-saksi ini juga telah melalui suatu proses pemeriksaan balas yang panjang dan memakan masa berhari-hari. Sungguhpun begitu, keterangan mereka adalah konsisten dan tidak bercanggah berkenaan inti pati penting kes terhadap perayu-perayu. Kami turut berpandangan bahawa hal ini menunjukkan bahawa saksi-saksi tersebut bercakap benar dan tidak diajar untuk memberikan keterangan.

[56] Kami bersetuju dengan apa yang telah diputuskan oleh Raja Azlan Shah HMP (ketika itu) dalam kes *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15; [1976] 1 LNS 184 seperti berikut:

> In this case different witnesses have testified to different parts of what had happened or what had been said and also there are, in the evidence of the witnesses for the prosecution, some discrepancies, as would be expected of witnesses giving their recollections of a series of events that took place in 1971–1973. *In my opinion discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened*. It may be open to criticism, or it might be better if they took down a notebook and wrote down every single thing that happened and every single thing that was said. But they did not know that they are going to be witnesses at this trial. *I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other*. It is, therefore, necessary to scrutinise each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

[57] Kami berpandu kepada prinsip yang telah digariskan oleh Mahkamah Persekutuan melalui Raus Sharif PMR (ketika itu) dalam kes *Ong Teng For & Anor v Public Prosecutor* [2012] 2 MLJ 666; [2013] 1 CLJ 39 seperti berikut:

> [33] It is settled law that the credibility of a particular witness and the weight to be given to his other evidence is manifestly within the province of a trial judge. In *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644; [2000] 3 CLJ 289, Shaik Daud JCA said that:
>
> > *There is no dearth of authorities to say that in every case, there are bound to be contradictions and discrepancies. The question to be decided by the trial judge is whether those contradictions and/or discrepancies are material ones so as to strike at the very root of the charge. It is for the trial judge to consider this since he was the one*

who saw and heard the evidence. In the present case the learned judge concluded that there were discrepancies but those discrepancies were not material ones. Since this involved the credibility of witnesses, we held that the learned judge was a better person to decide and an appellate court ought not to interfere with such findings.

[34] Further, in *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15; [1976] 1 LNS 184, *Raja Azlan Shah FJ* (as His Royal Highness then was) said:

In my opinion discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember accurately every single thing that happened. It may be open to criticism, or it might be better if they took down a notebook and wrote down every single thing that happened and every single thing that was said. But they did not know that they are going to be witnesses at this trial. I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinised each evidence very carefully as this involves the question of weight to be given to certain evidence in a particular circumstances.

[35] In the final determination of issues, *it is incumbent on the trial court to decide, having regard to the probabilities of the case and based on contemporaneous facts and documents, whether the witnesses or set of witnesses are speaking the truth on matters of central importance*.

[58] Kami juga turut berpandu kepada penghakiman Mahkamah Persekutuan dalam kes *Puganeswaran a/l Ganesan & Ors v Public Prosecutor and other appeals* [2020] 12 MLJ 165; [2020] 9 CLJ 326 melalui Abdul Rahman Sebli HMP (ketika itu) yang memutuskan seperti berikut:

[82] The proper approach to deal with discrepancies in evidence is well-settled by case law. In *Khoon Chye Hin v Public Prosecutor* [1961] 1 MLJ 105; [1961] 1 LNS 41 it was held that *even where a witness demonstrably lies, it would be to go too far to say that his evidence must be rejected entirely. The proper way to deal with the evidence of such witness is to treat it with suspicion and caution. In considering them, what the court has to decide is whether they are of such a nature as to discredit the witness entirely and render the whole of his evidence worthless and untrustworthy*: see *De Silva v Public Prosecutor* [1964] 1 MLJ 81; [1964] 1 LNS 32.

[83] In *Ugar v State of Bihar* AIR 1965 SC 277 the Supreme Court of India pointed out that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments ...

[59] Kami juga bersetuju dengan apa yang telah diputuskan oleh Abdul

Hamid HMT (ketika itu) dalam kes *Chean Siong Guat v Public Prosecutor* [1969] 2 MLJ 63 yang telah menyatakan seperti berikut:

> *Discrepancies may, in my view, be found in any case for the simple reason that no two persons can describe the same thing in exactly the same way. Sometimes what may appear to be discrepancies are in reality different ways of describing the same thing, or it may happen that the witnesses who are describing the same thing might have seen it in different ways and at different times and that is how discrepancies are likely to arise. These discrepancies may either be minor or serious discrepancies. Absolute truth is I think beyond human perception and conflicting versions of an incident, even by honest and disinterested witnesses, is a common experience*. In weighing the testimony of witnesses, human fallibility in observation, retention and recollection are often recognized by the court. Being a question of fact, what a magistrate need do is to consider the discrepancies and say *whether they are minor or serious discrepancies*. If, after conthem. On the other hand, *if a magistrate finds that the discrepancies do not detract from the value of the testimony of the witness or witnesses, it would then be proper for him to regard the discrepancies as trivial and ignore them*. On the other hand, if a magistrate finds that the *discrepancies relate to a material point which would seriously affect the value of the testimony of the witness or witnesses, then it would be his duty to weigh the evidence carefully in arriving at the truth*.

[60] Kami turut bersetuju dengan apa yang telah dinyatakan oleh Wan Yahya HMT (ketika itu) dalam kes *Pie bin Chin v Public Prosecutor* [1985] 1 MLJ 234 seperti berikut:

> *Discrepancies are no doubt present in this case, as they do ostensibly appear in most cases in evidence of witnesses for the prosecution as well as the defence. The transcripts of most evidence, when thoroughly toothcombed by any able lawyer, never failed to yield some form of inconsistencies, discrepancies or contradictions but these do not necessarily render the witness' entire evidence incredible. It is only when a witness's evidence on material and obvious matters in the case is so irreconcilable, ambivalent or negational that his whole evidence is to be disregarded.*
>
> Forgetfulness and failure to recall exactly certain events, which did not seem to be important to the witness, do not necessarily shake his credibility or render other parts of his story unworthy of belief. *Various persons are endowed with varying powers of cognition, attentiveness and perception, so that it is not uncommon for two witnesses to a common event to describe it in slightly differing versions.*

[61] Oleh itu, berdasarkan kepada kesemua yang dinyatakan di atas, kami mendapati bahawa kewujudan percanggahan-percanggahan dalam keterangan SP18, SP19 dan SP21 seperti yang dihujahkan oleh perayu-perayu tidak melemahkan kredibiliti SP18, SP19 dan SP21.

[62] Akhir sekali, perayu-perayu berhujah bahawa SP18, SP19 dan SP20 merupakan keterangan saksi berkepentingan dan keterangan mereka tidak boleh dipercayai serta seharusnya ditolak oleh hakim bicara. Menurut

perayu-perayu, SP18 adalah anak kepada SP20 dan anak saudara si mati, manakala SP19 merupakan jiran kepada 'Geng Siva'.

[63] Isu mengenai keterangan saksi berkepentingan ini juga telah dijawab oleh hakim bicara dalam alasan penghakimannya seperti berikut:

> [35] Peguam bela berhujah SP18 adalah saksi yang berkepentingan kerana beliau adalah anak kepada SP20 dan anak saudara kepada si mati oleh itu mahkamah perlu menolak keterangan SP18. Mahkamah memutuskan tidak ada anggapan undang-undang saksi yang berkepentingan tidak boleh dipercayai, *Balasingham v Public Prosecutor* [1959] 1 MLJ 193. Pihak pembelaan gagal mengemukakan apa-apa bukti yang menunjukkan SP18 tidak boleh dipercayai dan mempunyai motif untuk menganiaya OKT-OKT. Tambahan pula, keterangan SP18 disokong oleh keterangan SP19 dan SP21. Mahkamah merumuskan SP18 memberikan keterangan kerana kebetulan beliau berada di tempat kejadian dan melihat kejadian yang berlaku pada malam tersebut. Keterangannya tidak berat sebelah dan tidak ada kecenderungan untuk menolong SP20 dan si mati. Jika pun benar hujahan peguambela OKT-OKT bahawa SP18 adalah saksi yang berkepentingan (dinafikan) kekuatan kes pihak pendakwa bukan hanya bergantung kepada keterangan SP18 sahaja. Terdapat keterangan langsung dari SP19 dan SP21 yang membuktikan OKT-OKT secara niat bersama telah melakukan pembunuhan ke atas si mati.

[64] Masih berkaitan isu yang sama, perayu-perayu telah berhujah bahawa hakim bicara telah mengambil pendekatan yang berbeza dan berat sebelah apabila memutuskan untuk menolak keterangan SD9 dan SD10 atas alasan mereka adalah saksi berkepentingan.

[65] Berkenaan keterangan SD9 dan SD10 pula, hakim bicara dalam alasan penghakimannya telah menyatakan seperti berikut:

> [53] SD9 merupakan tuan rumah tempat SP18 dan SP21 berlindung dan melihat kejadian yang berlaku pada malam tersebut manakala SD10 adalah anaknya. Mereka mengakui tidak pernah memberikan statement kepada polis dan berusaha untuk memaklumkan kejadian pembunuhan tersebut kepada pihak polis. Mereka hanya muncul sebagai saksi-saksi bagi kes pembelaan dan mengatakan orang yang membunuh si mati ialah seorang yang memakai baju petak dan ada tuala Good Morning di poket seluarnya. Semasa diperiksa balas SD9 mengakui OKT4 adalah saudaranya dan bil hotelnya di Temerloh untuk hadir perbicaraan dibiayai oleh adik OKT4, pernah tidur di hotel Mentakab dibiayai oleh adik OKT4 dan beberapa kali menumpang OKT4 balik ke Mentakab dari Kuala Lumpur. Mahkamah melihat keterangan SD9 dan SD10 dengan penuh kecurigaan dan keterangan mereka berat sebelah kepada pihak pembelaan sedangkan mereka ada bersama SP18 dan SP21 dalam rumah yang sama semasa kejadian menetak ke atas si mati. Jika SP18 dan SP21 dapat melihat OKT-OKT yang menetak si mati, mustahil SD9 dan SD10 tidak melihat perkara yang sama kerana mereka berada di tempat yang sama dan pada masa yang sama ketika berlaku kejadian. Berdasarkan kepada hubungan persaudaraan di antara SD9, SD10 dan OKT4 pada pendapat mahkamah adalah

mustahil untuk seorang saudara rapat dan mempunyai hubungan yang baik dengan OKT4 tidak memaklumkan kepada polis perkara yang sebenar iaitu OKT4 yang ditangkap dan dituduh di atas kesalahan membunuh yang boleh membawa hukuman mati tidak terlibat dengan pembunuhan tersebut dan pembunuh sebenarnya ialah seorang yang memakai baju petak dan ada tuala Good Morning di poket seluarnya. Mahkamah bersetuju dengan penghujahan TPR bahawa SD9 dan SD10 memilih untuk tidak memaklumkan atau mengelak untuk memaklumkan kepada pihak polis kerana mereka telah tahu perkara yang sebenar berlaku iaitu OKT4 dan OKT-OKT yang lain bersama-sama terlibat dengan pembunuhan tersebut bukan seorang yang berbaju petak atau orang lain. Jika OKT-OKT, SD9 dan SD10 telah memaklumkan kepada pihak polis sudah tentu mereka boleh menjalankan siasatan untuk mengesahkan alegasi pihak pembelaan bahawa seorang yang berbaju petak yang telah membunuh si mati. Oleh yang demikian mahkamah merumuskan SD9 dan SD10 merupakan saksi yang berkepentingan dan keterangannya ada kecenderungan untuk menyokong dan membantu OKT4 dan OKT-OKT yang lain bertujuan membantu OKT-OKT bebas dari pertuduhan. Oleh itu mahkamah telah menolak keterangan SD9 dan SD10.

[54] Watak SD9 dan SD10 juga tidak pemah dicabar kepada saksi-saksi pendakwa walaupun pihak pendakwa telah mengemukakan keterangan SP18 dan SP21 berada dalam rumah SD9 ketika kejadian menetak berlaku. Seperti yang telah mahkamah nyatakan SD9 dan SD10 merupakan satu watak yang penting kerana mereka menyokong dakwaan OKT-OKT bahawa seorang yang berbaju petak yang menetak si mati dan OKT4 tidak ada di tempat kejadian pada masa si mati ditetak dan dibakar. Jika SP18 dan SP21 disoalbalas berhubung dengan tindakan SD9 dan SD10 semasa SP18 dan SP21 melihat kejadian tersebut mereka mungkin akan dapat menjelaskan apa yang SD9 dan SD10 lakukan ketika itu sama ada mereka melihat kejadian itu atau mungkin mereka berada dalam rumah tetapi tidak melihat kejadian itu. Kegagalan pihak pembelaan untuk menyoal balas saksi berhubung dengan peranan Vehtavelli menunjukkan pembelaan OKT hanyalah satu rekaan atau afterthought, *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; [2009] 3 CLJ 236. Dari sudut yang lain keterangan SD9 dan SD10 secara tidak langsung menyokong keterangan kes pendakwaan bahawa SP18 dan SP21 yang berada dalam rumah SD9 boleh melihat dengan jelas apa yang berlaku di tempat kejadian pada malam tersebut.

[66] Berdasarkan kepada kesemua di atas, kami mendapati bahawa hakim bicara telah menimbangkan isu kebolehpercayaan keterangan SP18, SP19 dan SP21 dengan teliti dan menyeluruh sebelum menerima keterangan mereka. Hakim bicara juga telah menimbangkan isu kebolehpercayaan keterangan SD9 dan SD10 dengan teliti dan menyeluruh sebelum menolak keterangan mereka.

[67] Kami berpendapat bahawa hakim bicara tidak tersalah arah dalam menimbangkan keterangan SP18, SP19, SP21, SD9 dan SD10 seperti yang dinyatakan di atas. Hal ini bertepatan dengan prinsip yang telah digariskan oleh Ismail Khan HMT (ketika itu) dalam kes *Balasingham v Public Prosecutor* [1959] 1 MLJ 193 (yang telah dirujuk oleh hakim bicara) seperti

berikut:

> After all there is *no legal presumption that an interested witness should not be believed*. He is entitled to credence until *cogent reasons for disbelief can be advanced* in the light of evidence to the contrary and the surrounding circumstances.

[68] Kami bersetuju bahawa tiada prinsip undang-undang yang menyatakan bahawa keterangan saksi yang berkepentingan harus ditolak mentah-mentah oleh mahkamah. Keterangan saksi berkepentingan masih boleh diterima oleh mahkamah selagi mana tiada keterangan kukuh yang menunjukkan bahawa keterangan mereka ini tidak boleh dipercayai.

[69] Pada hemat kami, hakim bicara yang mempunyai kelebihan audio-visual telah membuat penilaian yang menyeluruh terhadap keterangan saksi-saksi ini dan membuat dapatan fakta bahawa keterangan mereka adalah konsisten dan boleh dipercayai. Dapatan ini telah dikupas dengan teliti dan menyeluruh oleh hakim bicara sepanjang alasan penghakimannya.

[70] Oleh itu, mahkamah ini selaku mahkamah yang mendengar rayuan seharusnya tidak mengganggu dapatan fakta hakim bicara tersebut secara sewenang-wenangnya melainkan terdapatnya sebab yang kukuh untuk melakukan sedemikian seperti penyalaharahan atau sebagainya.

[71] Mahkamah ini melalui Azahar Mohamed HMR (ketika itu) dalam kes *Davendar Singh a/l Sher Singh v Pendakwa Raya* [2012] MLJU 321; [2012] 1 LNS 261 telah memutuskan seperti berikut:

> [9] To begin with, we are mindful of the principle of law as submitted by Puan Nurul Huda Nur A'ini, the learned deputy public prosecutor that in respect of an appeal which really turns upon a question of fact, *an appellate court is generally very reluctant to disturb a finding of fact by any trial judge for the reason that as trier of fact the trial judge has audio-visual advantage which we do not have. Nonetheless, it would be open to us to upset the findings made by a trial judge if such a finding is not supported by evidence or the decision is against the weight of the evidence or there is no proper judicial evaluation of the evidence or there is misdirection in law or the trial court has fundamentally misdirected itself.* In this regard, judicial appreciation and evaluation of evidence is at the heart of the duty of the learned trial judge. It is the duty of the learned trial judge to undertake a positive evaluation of the evidence, which includes a careful analysis of the credibility and reliability of the witnesses for the prosecution (see: *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85). It is also his duty to consider the entire evidence presented before him, including the evidence which favours the defence. On what constitutes judicial appreciation of evidence, it is apt to bear in mind the following words of Gopal Sri Ram JCA (as he then was) in *Lee Ing Chin & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19:
>
> > A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting

A or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.

[72] Secara keseluruhannya, kami bersetuju dengan dapatan hakim bicara bahawa keterangan pengecaman SP18, SP19 dan SP21 terhadap perayu-perayu adalah kukuh dan konsisten, serta selamat untuk diterima oleh mahkamah dalam menyabitkan mereka dengan pertuduhan kes ini. Kami tidak menjumpai sebarang sebab untuk mengganggu dapatan fakta hakim bicara seperti yang dinyatakan di atas.

[73] Kesimpulannya, kami mendapati tiada sebarang merit terhadap isu bersama yang dibangkitkan oleh perayu-perayu dalam rayuan ini.

R20 (PERAYU PERTAMA) DAN R21 (PERAYU KEDUA)

[74] Perayu kedua telah membangkitkan isu mengenai pemakaian s 27 Akta Keterangan 1950 oleh hakim bicara terhadapnya berkenaan penemuan tiga bilah parang yang dikatakan sebagai senjata pembunuhan si mati.

[75] Berkenaan isu ini, kami bersetuju dengan perayu kedua bahawa seksyen tersebut tidak terpakai terhadapnya memandangkan parang tersebut tidak ditemui hasil pandu arah perayu kedua tetapi dijumpai oleh SP15 di bawah katil SP12. SP15 telah menghubungi SP16 yang telah kemudiannya ke rumah tersebut untuk membuat rampasan terhadap parang tersebut. Tambahan pula, analisa DNA yang dijalankan terhadap parang tersebut tidak menemui kesan DNA perayu-perayu mahupun si mati.

[76] Selanjutnya, perayu pertama dan perayu kedua juga mendakwa bahawa si mati telah dibunuh oleh seorang yang memakai baju bercorak petak-petak dan kewujudan orang ini disokong oleh keterangan SD9 dan SD10 serta rakaman video yang dirakam SP18.

[77] Namun begitu, hakim bicara telah menolak keterangan SD9 dan SD10 seperti mana yang telah dibincangkan di atas. Hakim bicara juga telah menolak penerimaan masuk rakaman video tersebut sebagai ekshibit memandangkan

rakaman tersebut adalah tidak jelas serta tidak dihantar untuk analisa forensik bagi menentusahkan keaslian dan ketulenannya. A

[78] Kami berpendapat bahawa penolakan masuk rakaman video tersebut atas alasan yang dinyatakan oleh hakim bicara adalah berlandaskan undang-undang seperti mana yang telah diputuskan sebelum ini oleh mahkamah ini dalam kes *Mohd Khayry bin Ismail v Public Prosecutor* [2014] 4 MLJ 317; [2014] 1 LNS 412 seperti berikut: B

> [9] We have read the appeal record and submissions of the parties in detail. We are grateful for the comprehensive submissions. After much consideration of the submission of the learned counsel we are of the considered view the appeal must be dismissed. Our reasons, inter alia, are as follows: C
>
> (a) On the issue of CCTV recording at the apartment the learned counsel says:
>
> (i) PW24 made a copy of the recording by downloading to a thumb drive with the aid of a CPU and later transferred into the CD which was marked as exh P13; and D
>
> (ii) CD was then handed over to PW 20 who prepared the report on the CD which was marked as exh P11. The learned counsel argues that there was no certificate tendered under s 90A of the Evidence Act 1950 ('the EA 1950') and there was no oral evidence adduced by PW 24 that P13 was produced in accordance with the said section. Similar arguments were also placed in respect of the CCTV recording in Giant Supermarket. E
>
> (b) We do not find merit in the technical arguments placed by the learned counsel. Our reasons, inter alia, are as follows: F
>
> (i) Tape recording evidence or CCTV recording, etc. at common law will be admissible based on 'res gestae' principles as truth of its contents although they may be hearsay or even self serving statement. Section 6 of EA 1950 and also other sections give statutory recognition to 'res gestae' principle in the widest form and is not restricted to the common law parameters. The test for relevancy is set out in the section itself in no uncompromising terms. There appears to be no comprehensive formula for its admissibility save as to guidelines suggested and/or imposed by courts all for good reasons (see *Amrrita Lal Hazra v Emperor* (1915) ILR 42 Cal 957 *Bandahala bin Undik v Public Prosecutor* [2014] 1 CLJ 708). The said s 6 of EA 1950 reads as follows: G H
>
> Fact which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places.
>
> (ii) *at common law any form of tape recording, video recording, etc.; if relevant is made admissible if the court is satisfied of its accuracy and that it has not been tampered with, etc*. The jurisprudence relating to its admissibility as well as ss 3 and 61 of EA 1950 is set out in *Janab's Key to Criminal Procedure and Evidence*, (2nd Ed) and it reads as follows: I

A Document before the 1993 Amendment A 851 to the Act was defined in s 3 of the Act to mean any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means intended to be used or which may be used for the purpose of recording that matter. Under the new amendment it includes any matter embodied in a disc, tape, film, sound
B track or other device whatsoever. A wide and extended meaning has been given to the definition 'document'. Previously documents at least related to things which could not be easily tampered with. Now documents include items which could be easily tampered with. It is submitted that the admission of such documents which could be easily tampered with must be admitted with caution.

C In *R v Maqsud Ali* [1965] 2 All ER 465 Marshall J observed:

> ... for many years now photographs have been admissible in evidence on proof that they are relevant to the issues involved in the case and that the prints are taken from negatives that are untouched. The print as seen represent that have been reproduced by means of mechanical and
D chemical devices. Evidence of things seen through telescopes or binoculars which otherwise could not be picked up by the naked eye have been admitted, and now there are devices for picking up, transmitting, and recording conversations. We see no difference in principle between a tape recording and a photograph. In saying this we must not be taken as saying
E that such recordings are admissible whatever the circumstances, but it does appear to this court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded properly identified; provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape recording is admissible in evidence.

F Such documents when produced for the inspection of the court are referred to as documentary evidence. Thus, documentary evidence may include not only documents in writing but also maps, plans, graphs, drawings, photographs, discs, tapes videotapes, films and negatives (see *Cross on Evidence*).

G (iii) the amendments in relation to documents to EA 1950 do not in any way affect the common law position as set out in *R v Maqsud Ali*. The amendments allow further hearsay documents which may be difficult to be made admissible under the common law because of the hearsay rule and its prejudicial effect, to be made admissible provided the criteria set
H out in the amendments are complied with. The new amendments such as s 90A do not displace common law rules as to admissibility. That is to say if the party cannot admit a document in consequence of the common law restriction then he may get the document admitted under any of the new provisions such as s 90A, etc;

I (iv) in the instant case, *R v Maqsud Ali* will apply, as there is no issue as to the correctness of recording or tampering, etc. Even if s 90A was to be made applicable, a certificate is not sine qua non for its admissibility. The Court of Appeal in *Gnanasegaran a/l Pararajasingam v Public Prosecutor* [1997] 3 MLJ 1; [1997] 4 CLJ 6 had asserted that the production of the certificate is permissive and not mandatory. The Court of Appeal on this

issue observed:

A

On reading through s 90A of the Act, we are unable to agree with the construction placed by learned counsel. First and foremost, s 90A which has seven subsections should not be read disjointedly. They should be read together as they form one whole provision for the admissibility of documents produced by computers. As stated earlier, s 90A was added to the Act in 1993 in order to provide for the admission of computer-produced documents and statements as in this case. On our reading of this section, we find that under sub-s (1), the law allows the production of such computer-generated documents or statements if there is evidence, firstly, that they were produced by a computer. Secondly, it is necessary also to prove that the computer is in the course of its ordinary use. In our view, there are two ways of proving this. One way is that it 'may' be proved by the production of the certificate as required by sub-s (2). Thus, sub-s (2) is permissive and not mandatory. This can also be seen in sub-s (4) which begins with the words 'Where a certificate is given under sub-s (2). These words show that a certificate is not required to be produced in every case. It is our view that once the prosecution adduces evidence through a bank officer that the document is produced by a computer, it is not incumbent upon them to also produce a certificate under sub-s (2) as sub-s (6) provides that a document produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use. It is also our view that the prosecution can tender the computer printout through the investigating officer without calling any bank officer. Therefore, when they adopt this way of proof, then it would be incumbent upon them to establish that the document is produced by a computer in the course of its ordinary use by producing the certificate under sub-s (2). The reason seems to me to be obvious as the investigating officer will be in no position to say that the printout is produced by a computer in the course of its ordinary use, as he is not an officer of the bank.

B

C

D

E

F

In the present case, Zainal — the person in charge of the operations of current accounts — testified that the statement of accounts was a computer printout. Therefore, in our view, the first part of sub-s (1) has been proved, ie that the document is a computer printout. It would be superfluous for him to issue a certificate under sub-s (2) when firsthand evidence that 'the document so were produced by a computer' was given by Zainal. It would be superfluous to have a provision such as in sub-s (6) if in every case a certificate must be produced. It follows, therefore, that such a certificate need only be tendered if an officer like Zainal is not called to testify that the statement is produced by a computer. Then the certificate becomes relevant to establish that the document is produced by a computer in the course of its ordinary use. It is our view that when such an officer is not called, the court cannot rely on the deeming provision of sub-s (6). Once the court accepts the evidence of Zainal — and in this case we cannot see any reason whatsoever for the court not to as there was no challenge by cross-examination — the prosecution has succeeded in proving what s 90A(1) requires them to prove: that such document was produced by the computer and in view of the deeming provision of sub-s (6), the second part is also proved.

G

H

I

(v) *Gnanasegaran*'s case was further endorsed by the Federal Court in *Ahmad Najib Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800. In

addition, the relevant witnesses who were involved in extracting the CCTV recording were present in court and gave evidence. Ultimately it is for the court to decide on the issue of relevancy as well as admissibility. Whether a particular evidence is relevant is a question of law (see *Bibhati v Ramendra Narayan* AIR 1947 PC). Once it is decided as relevant, the rules governing admissibility of evidence are procedural in nature and not a substantive right. (See *Msimanga Lesley v Public Prosecutor* [2005] 4 MLJ 314; [2005] 1 CLJ 398). Once admitted the issue will only be as to probative force or whether it should be excluded under the fairness rule, etc (see s 136). The complaint as to admissibility on the grounds of hearsay is a factor which need to be taken by the courts before any evidence or documents is made admissible pursuant to s 136 of EA 1950 without compromising on the 'fairness rule' (see *Liang Weng Heng v Public Prosecutor* [2013] MLJU 1283). Once made admissible, the real issue would be its probative force and not admissibility if the evidence is relevant. When prejudicial evidence is admitted breaching the 'fairness rule' the integrity of decision making process is compromised and in consequence appellate intervention may be necessary. The facts of the instant case do not warrant so on this issue.

[79] Sebaliknya, terdapat keterangan langsung iaitu pengecaman positif oleh saksi-saksi pendakwaan yang menunjukkan penglibatan perayu pertama dan perayu kedua dalam pembunuhan si mati. Maka, pada hemat kami, isu ini tidak berbangkit sama sekali.

[80] Secara keseluruhannya, kami mendapati bahawa isu-isu yang dibangkitkan oleh perayu pertama dan perayu kedua di dalam rayuan-rayuan (R20) dan (R21) adalah tidak bermerit sama sekali dan seharusnya ditolak.

R22 (PERAYU KETIGA)

[81] Perayu ketiga membangkitkan isu bahawa tidak terdapat sebarang kesan DNA pada parang dan pakaian yang dirampas pihak polis yang mengaitkan perayu ketiga dengan si mati.

[82] Berkenaan isu ini, kami bersetuju dengan hakim bicara bahawa keterangan DNA hanyalah keterangan sokongan sahaja. Kami turut bersetuju dengan hakim bicara bahawa ketiadaan kesan DNA pada barang-barang kes tersebut tidak menjejaskan keterangan langsung kes ini yang berlandas kepada keterangan saksi-saksi mata yang mengenali dan mengecam perayu ketiga ketika menyaksikan kejadian pembunuhan si mati tersebut.

[83] Mahkamah Persekutuan melalui Chong Siew Fai HB (Sabah dan Sarawak) (ketika itu) dalam kes *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 233 telah memutuskan:

[4] The trial judge had erred in law when he faulted the investigating officer for not lifting the fingerprints off the wrappings of the cannabis and for not taking photographs of the street light in front of the said house. *Where the identity of a culprit is in question or is required to be proved, fingerprint evidence will be of great significance and value*. In the instant case, however, the charge alleged trafficking in the form of a 'sale' and *there was evidence indicating the identities of the alleged offenders* and the sale transaction. *Fingerprint evidence, therefore, assumed little value or significance*. As regards photographs, it was the events taking place inside the said house and not outside it which really mattered.

[84] Dalam nada yang sama, mahkamah ini dalam kes *Public Prosecutor v Ebrahim Mirzaie Hj Ebrahim Deh Mokhtar* [2017] 3 MLJ 827; [2017] 1 CLJ 575 (MR) dengan merujuk kepada kes *Manser Md Rashid* telah menyatakan seperti berikut:

[38] *The evidential value of CCTV evidence, DNA profiles and fingerprint impressions as decided by high authority is only corroborative*. The learned trial judge correctly appreciated the position. In *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 233, the Federal Court stated that:

> Where the identity of a culprit is in question or required to be proved, fingerprint evidence would be of great significance and immense value. In the present case under appeal, however, the charge alleged trafficking in the form of sale and there is evidence indicating the identities of the alleged offenders and the sale transaction. Fingerprint evidence on the newspaper wrapping, white plastic and the loytape, therefore, assumes little value or significance.

[39] *Now, having scrutinised the evidence, we were with the learned DPP that even without the CCTV evidence, DNA profiles and fingerprint impressions, there are sufficient evidence to prove the prosecution's case*.

[85] Secara keseluruhannya, kami mendapati bahawa isu-isu yang dibangkitkan oleh perayu ketiga di dalam rayuan (R22) adalah tidak bermerit dan seharusnya ditolak.

R23 (PERAYU KEEMPAT)

[86] Perayu keempat telah membangkitkan isu bahawa hakim bicara tidak memberikan pertimbangan sewajarnya kepada pembelaan alibi perayu keempat. Di dalam kes ini, hakim bicara telah menolak pembelaan alibi perayu keempat kerana perayu keempat tidak pernah mengemukakan notis di bawah s 402A Kanun Tatacara Jenayah kepada pihak pendakwaan.

[87] Kami bersetuju dengan hakim bicara bahawa kegagalan untuk mematuhi keperluan di bawah seksyen tersebut akan mengakibatkan sebarang keterangan yang menyokong pembelaan alibi tersebut ditolak oleh mahkamah.

[88] Kami merujuk kepada kes yang telah diputuskan oleh Mahkamah Agung iaitu *Vasan Singh v Public Prosecutor* [1988] 3 MLJ 412; [1989] 1 CLJ Rep 166 (MA) di mana Harun Hashim HMA (ketika itu) ketika menyampaikan penghakiman mahkamah telah memutuskan seperti berikut:

> The primary purpose of an alibi notice is to alert the prosecution to the fact that an alibi might be relied upon so that they may have the opportunity before the trial of making such investigations as they think fit. It may well be that the alibi is in fact true in which event the prosecution will either withdraw the charge or offer no evidence in the case.
>
> The defence of alibis a legitimate defence and in factis often the only evidence of an innocent man. The difficulty, it seems to us, is when and how to exclude an alibi defence for non-compliance with s 402A. First, a distinction should be drawn between a bare denial and an alibi defence. Evidence of bare denial is in any case always admissible. In order to distinguish one from the other, the court must know the nature of the evidence. As was said in *Ku Lip See v Public Prosecutor* [1982] 1 MLJ 194; [1981] 1 LNS 155 at p 196:
>
> > If a trial court *having considered the evidence* put forward by the defence, holds that such evidence amounts to evidence in support of an alibi for which no notice under s 402A Criminal Procedure Code has been given, then he has no discretion in the matter but to exclude such evidence. (Emphasis supplied)
>
> *It follows that, initially, the court cannot prevent an accused person from giving evidence. Having heard the evidence, then the trial court must decide the nature of the evidence. If it is only evidence of a bare denial, the evidence stays. If it is evidence in support of an alibi and no notice under s 402A has been given, then he must exclude that part of the evidence from his consideration of the defence evidence*.

[89] Kami juga merujuk kepada penghakiman Mahkamah Persekutuan dalam kes *Ku Lip See v Public Prosecutor* [1982] 1 MLJ 194; [1981] 1 LNS 155 melalui Abdul Hamid HMP (ketika itu) yang telah memutuskan bahawa:

> A determination whether particular *evidence is evidence in support of alibi entails a consideration whether the evidence shows or tends to show that by reason of the presence of the accused at some particular place or area at a particular time he cannot be or is unlikely to be at the place where the offence is committed*. It is difficult if not impossible to envisage with reference to a particular charge what evidence amounts or does not amount to evidence in support of a defence of alibi. It depends very much on the facts of each particular case. It has been described that 'What is ordinarily meant by an alibi is that the accused's presence elsewhere is essentially inconsistent with his presence at the time and place alleged, and therefore with participation in the crime. *An alibi may absolutely preclude the possibility of presence at the alleged time and place of the act; or the alibi may not involve absolute impossibility, but only high improbability and yet be convincing* (see *Criminal Law Review* 1978 pp 277–8 and also on p 278 where it is further stated that 'a true alibi defence consists of a affirmative proof of the defendant's presence somewhere other than at the time and place alleged').

[90] Seterusnya, kami berpandu kepada penghakiman Mahkamah Agung

dalam kes *Hussin bin Sillit v Public Prosecutor* [1988] 2 MLJ 232; [1988] 1 CLJ Rep 128 melalui Mohd Azmi HMA (ketika itu) yang telah memutuskan bahawa: A

> In the absence of a statutory definition in s 402A(1) of the words 'evidence in support thereof, ie evidence in support of a defence of alibi, we agree with the Federal Court in *Ku Lip See* that their meaning cannot differ from that assigned by s 11(8) of the English Act on the term 'evidence in support of an alibi'. In the instant case, the evidence disclosed that the accused was with his victim for approximately one hour from about 7.30pm when he gave her a lift in his motor car, Adopting closely s 11(8) for the interpretation of 'evidence in support of a defence of alibi', we are of the opinion that the amendment of the charge from 'about 8.30pm' to 'about 8pm' did not afford the accused an escape from the ambit of the definition, and could not in the circumstances of the case relieve the accused from the duty to give alibi notice regarding his whereabouts from 7.30pm to 10.30pm on the date in question. Not only evidence pertaining to the one hour that he and the victim were alleged to be together but also evidence relative to his whereabouts during that particular evening on 3 April 1981 must be considered as one occasion or one single event or transaction. Whether the charge relates to 8pm or 8.30pm, his whereabouts on the evening in question showing or tending to show that by reason of his presence at some other place or area at a particular time, he cannot be or is unlikely to be at the place where the offence was committed, should be classified as evidence in support of a defence of alibi. As such the alteration in the charge as to time by half an hour could not possibly on the facts of the case alter the legal position as to the requirement of alibi notice. In our view both the original and amended charges refer to one and the same occasion on the evening of 3 April 1981, and accordingly any argument on the basis of the whereabouts of the accused on 'another occasion' which evidence is not 'evidence in support of a defence of alibi 'does not arise at all.
>
> The accused has also failed to satisfy us that by reason of any error or omission in the particulars given in the original charge, the time, place and date of the alleged offence were so uncertain that he was in fact misled in not supplying the particulars of alibi required to be given to the public prosecutor within the prescribed period, so as to justify the trial court to conclude that the disputed evidence which he intends to adduce at the trial is having regard to the circumstances of the case, not 'evidence in support of a defence of alibi' and thereby should remain outside the restriction of s 402A. Both in the original and amended charges, the commission of the offence of rape was alleged to have taken place on the evening of 3 April 1981 at Jalan Tun Fuad, Tanjung Lipat, Kota Kinabalu. Having regard to the full particulars given in the original charge as to the date and place of the alleged offence, and the nature of the subsequent amendment affected before the commencement of the actual trial, we are of the view that in the light of the facts and circumstances of this case, no reasonable judge can possibly conclude that the whereabouts of the accused between 7.30pm and 10.30 pm on the evening of 3 April 1981 is not 'evidence in support of a defence of alibi' and it makes no difference whether the approximate time given in the charge is 'about 8pm' or 'about 8.30pm'. *Any evidence to be adduced by the defence on the whereabouts of the accused on the evening of 3 April 1981, showing or tending to show that by reason by his presence elsewhere, he was not or was unlikely to have been at Jalan Tun Fuad, Kota Kinabalu and therefore would be essentially*

inconsistent with his participation in the crime, must be excluded unless prior notice has been given. The exclusion of the alibi evidence in this particular case was therefore correct in law.

We would hasten to add that if alibi notice had been served in relation to the original charge, then the accused would be under no duty pursuant to the provisions of s 402A to serve a second notice merely because the prosecution had elected to amend the charge at the commencement or in the course of the trial. In such a situation, any evidence of the whereabouts of the accused on another occasion or not relative to the evening of 3 April 1981 would continue to be excluded from the restriction notwithstanding any subsequent amendment of the charge. In short, evidence of the whereabouts of the accused on a particular occasion which would have been admissible without notice under the original charge would not become inadmissible as a result of the charge being subsequently amended in such manner as to render that particular occasion as the amended time of the alleged commission of the crime.

[91] Lanjutan daripada isu ini, perayu keempat menyatakan bahawa peguambela asalnya di Mahkamah Tinggi adalah tidak kompeten akibat daripada kegagalannya untuk mengemukakan notis alibi kepada pihak pendakwaan.

[92] Namun begitu, kami bersetuju dengan TPR yang terpelajar dan mendapati bahawa kegagalan peguambela asal perayu keempat untuk mengemukakan notis alibi di dalam kes ini tidak terjumlah kepada suatu 'flagrant incompetence' dan tidak mengakibatkan kegagalan keadilan kepada perayu keempat.

[93] Mengenai isu ini, kami berpandu kepada kes *Yahya Hussein Mohsen Abdulrab v Public Prosecutor* [2021] 5 MLJ 811; [2021] 9 CLJ 414 di mana Tengku Maimun Tuan Mat, KHN dalam menyampaikan penghakiman Mahkamah Persekutuan telah memutuskan seperti berikut:

[43] At this juncture, it is safe to say that it is not unheard of (at least conceptually) for courts to set aside convictions by finding that there was an unfair trial on the ground that counsel was flagrantly incompetent such that effectively, there was no right to counsel. *In other words, based on a series of decided cases, where the conduct of the counsel in the trial process gives rise to a miscarriage of justice, it is incumbent upon the court to set aside the conviction*.

[44] Taking heed from high authorities, *the test in all cases when considering whether there was a breach of fair trial as a result of incompetent counsel is to ask the question whether the incompetency was flagrant, such that it caused or gave rise to a miscarriage of justice*. As explained by McHugh J in *TKWJ*:

> A test such as 'flagrant incompetent', while a convenient label may show that a miscarriage of justice has occurred in a particular case, is unhelpful in determining whether there has been a miscarriage of justice within the terms of s 6(1) of the Criminal Appeal Act. Whether there has been a miscarriage of

justice is the ultimate issue that the court must decide. (Emphasis added.)

Thus, the focus of the inquiry by the court is not on the advocacy skills or performance of trial counsel, rather it is the acts or omissions themselves as they impact on the fairness of the trial and whether the result constitute a miscarriage of justice.

[45] In this regard, those of us in the legal profession must recognise that there is a large influx of members of the Bar. Some are obviously more renowned than others for various reasons such as advanced experience and general access to information and network. There will always be the case where an accused person is dissatisfied with the standard of advocacy of his counsel. However, where counsel fails to abide by certain standards or does something another lawyer would have done differently, the accused or litigant's recourse is to the disciplinary or complaints mechanism established by law — or perhaps write a bad review. He is not otherwise entitled to use subjective or perceived notions of incompetency as a reason to complain about his conviction.

[46] *Be that as it may, in extreme cases, assessed objectively, where counsel has acted far below the accepted standard such that his flagrant incompetency jeopardises the accused person's right to a fair trial*, the overall purpose of art 5(1) of the Federal Constitution — which is to deprive life or personal liberty only according to law — would be rendered illusory. As such, in those circumstances, the just thing to do would be to set aside the conviction.

[94] Dalam nada yang sama, Gopal Sri Ram HMP (ketika itu) dalam kes *Shamim Reza bin Abdul Samad v Public Prosecutor* [2009] 2 MLJ 506; [2009] 6 CLJ 93 ketika menyampaikan penghakiman Mahkamah Persekutuan telah memutuskan seperti berikut:

[6] That, then, is the state of the authorities. In our considered judgment, the incompetence of counsel in the conduct of a defence in a criminal trial is a ground on which a conviction may be quashed *provided that: (i) such incompetence must be flagrant in the circumstances of the given case; and (ii) it must have deprived the accused of a fair trial thereby occasioning a miscarriage of justice*. Nothing short will suffice. And in considering the question, an appellate court must have regard to the conduct of counsel as a whole and not merely to his or her failure in one or two departments. Further, in the ordinary way, a court whether at first instance or at the appellate state will of course have regard to its paramount function and duty to ensure that justice is done so that the incompetence of counsel will not factor into the equation.

[95] Isu yang sama dibangkitkan dalam rayuan ini pernah dibangkitkan di hadapan mahkamah ini sebelum ini seperti mana dalam kes *Mazlan bin Othman v Pendakwa Raya* [2012] MLJU 1786; [2013] 1 CLJ 750, MR. Abdul Malik Ishak HMR (ketika itu) telah menyatakan seperti berikut:

[115] Before us, it was argued that the appellant here was deprived of a fair hearing because of the incompetence of counsel at the High Court level. Factually speaking, the circumstantial evidence alluded to earlier in this judgment linked the appellant to the offence of committing armed robbery and discharging a firearm in the course

of that robbery. The strong circumstantial evidence pointed to the guilt of the appellant. The presence of the appellant at the goldsmith's shop was linked to the bullet slug that was retrieved from the left shoulder of SP10 and that bullet slug came from the Styer pistol (exh 'P23') that was in the possession of the appellant. Even the bullet casing that was recovered at the goldsmith's shop came from the same Styer pistol (exh 'P23'). To compound the matter further, the recovery of eight gold chains in the front right pocket of the appellant's trousers mixed with glass splinters sealed the fate of the appellant. The possibility that the appellant was not at the goldsmith's shop must be construed as too 'far-fetched' (to borrow the words of Gopal Sri Ram FCJ in the *Shamim Reza*'s case). Consequently, the fact that the learned JC held that no alibi notice was given within the prescribed time to the public prosecutor and had excluded the evidence connected with alibi defence has not occasioned a miscarriage of justice. In our judgment, there was no flagrant incompetence on the part of the defence counsel who conducted the defence before the learned JC.

[116] It must be borne in mind that the defence counsel having conduct of the case before the learned JC when confronted by the learned JC as to whether any notice of the alibi defence was forwarded to the public prosecutor replied that he did not do so for want of time. This response showed that the defence counsel knew the Jaw and he cannot be said to be incompetent or 'flagrantly incompetent' (to borrow the words of Gopal Sri Ram FCJ in the *Shamim Reza*'s case). *The learned JC convicted the appellant not because of the incompetence of the defence counsel but rather because of the overwhelming circumstantial evidence adduced by the prosecution*.

[117] In our judgment, on the facts, it is a gross miscarriage of justice not to convict the appellant for committing both the offences as per the charges (*Yong Kar Mun v Public Prosecutor* [2012] 6 MLJ 209; [2011] 1 LNS 1750). *We must 'be on guard against any tendency of accused persons who have been properly and deservedly convicted to put the result down, not to the crime committed, but to the incompetence of counsel'* (per Cooke J in *R v Pointon* [1985] 1 NZLR 109, 114 (CA)).

[96] Dalam kes di hadapan kami ini, antara lainnya, perayu keempat telah dicamkan dengan positif oleh saksi-saksi pendakwaan, dan kualiti pengecaman adalah kukuh. Maka pembelaan alibi perayu keempat tidak boleh mengatasi keterangan pengecaman yang positif dan kukuh oleh saksi-saksi pendakwaan tersebut.

[97] Dalam kes *Duis Akim*, Richard Malanjum HB (Sabah dan Sarawak) (ketika itu) dalam menyampaikan penghakiman Mahkamah Persekutuan telah memutuskan seperti berikut:

[82] However, *alibi could not prevail over the positive identification* of an accused person especially so in the face of categorical statements coming from credible witnesses who had no ill motives in testifying.

[98] Selain itu juga, walaupun perayu keempat tidak mengemukakan notis alibi, hakim bicara tetap meneliti dan menimbang keterangan saksi pembelaan

SD9 dan SD10 yang dipanggil untuk menyokong pembelaan perayu keempat tersebut dan mendapati bahawa pembelaan perayu keempat hanyalah suatu penafian semata-mata.

[99] Berdasarkan kepada kesemua yang dinyatakan di atas, kami berpendapat bahawa perayu keempat tidak diprejudiskan sehingga menyebabkan berlakunya kegagalan keadilan apabila peguambela asalnya tidak mengemukakan notis alibi ketika perbicaraan di hadapan hakim bicara.

[100] Seterusnya, perayu keempat turut membangkitkan isu mengenai rakaman video yang dikatakan dirakam oleh SP18 sewaktu kejadian berlaku. Berkenaan rakaman video ini, hakim bicara telah menolak kemasukannya sebagai ekshibit memandangkan rakaman tersebut tidak dihantar untuk analisa forensik bagi menentusahkan keaslian dan ketulenannya. Kami berpendapat bahawa tiada salah arah dilakukan oleh hakim bicara berkenaan keputusannya tersebut.

[101] Secara keseluruhannya, kami mendapati bahawa isu-isu yang dibangkitkan oleh perayu keempat di dalam rayuan (R23) adalah tidak bermerit.

R24 (PERAYU KELIMA)

[102] Perayu kelima membangkitkan isu bahawa hakim bicara telah gagal untuk menilai pembelaannya bahawa perayu kelima cuma berada di tempat kejadian dan tidak terlibat dengan pembunuhan si mati, maka s 34 Kanun Keseksaan tidak terpakai terhadap perayu kelima. Kami tidak bersetuju dengan hujahan ini berdasarkan kepada keseluruhan fakta kes ini.

[103] Kami mendapati hakim bicara telah menimbangkan keseluruhan fakta kejadian kes ini dan peranan perayu kelima dalam kejadian tersebut sebelum merumuskan bahawa perayu kelima juga mempunyai niat bersama perayu-perayu yang lain untuk menyebabkan kematian si mati. Kami dapati hakim bicara tidak terkhilaf dalam dapatannya tersebut memandangkan di dalam kes *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336; [1987] CLJ Rep 241 (MA), Mahkamah Agung telah memutuskan:

> In law, common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. *There must be proved either by direct or by circumstantial evidence that there was: (a) a common intention to commit the very offence of which the accused persons are sought to be convicted; and (b) participation in the commission of the intended offence in furtherance of that common intention*.
>
> Where the prosecution case rest on circumstantial evidence, the circumstances

which are proved must be such as necessarily lead only to that inference. *Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused*. (The Supreme Court (of India) on *Criminal Law (1950–1960)* by JK Soonavala p 188–193).

[104] Perayu kelima turut membangkitkan isu bahawa hakim bicara telah terkhilaf apabila mendapati pihak pendakwaan telah membuktikan s 300(c) Kanun Keseksaan sedangkan SP2 telah gagal untuk menyatakan bahawa kecederaan yang dialami oleh si mati adalah mencukupi secara lazimnya untuk menyebabkan kematian kepada si mati ('sufficient in the ordinary course of nature to cause death to the deceased').

[105] Prinsip undang-undang adalah jelas bahawa pertuduhan untuk kesalahan membunuh adalah di bawah s 302 Kanun Keseksaan dan bukannya di bawah mana-mana peruntukan s 300(a) hingga (d) Kanun Keseksaan. Bagi membuktikan kesalahan bunuh di bawah s 302 Kanun Keseksaan, pihak pendakwaan perlu membuktikan mana-mana elemen di bawah s 300 Kanun Keseksaan yang hanya menjelaskan bagaimana elemen mens rea boleh dibuktikan terhadap tertuduh.

[106] Dalam kes *Hoo Ah Tee v Public Prosecutor* [2013] 4 MLJ 636; [2013] 4 CLJ 228, mahkamah ini telah memutuskan seperti berikut:

> [11] ... (ii) It is wrong to say that the accused was *charged under* s 300(a) or (b) or (c) or (d). The only charge to attract s 302 is a charge for murder and for that the prosecution has to prove one of the elements in s 300. *Technically there cannot be a charge on any of the limbs of s 300. The charge must only be for murder*.
>
> (iii) *Section 300(a) to (d) only explains how intention can manifest for the presumption of culpable mental state to operate to satisfy the element of mens rea to sustain a charge of murder* ...

[107] Setelah meneliti keseluruhan Rekod Rayuan, kami mendapati bahawa SP2 tidak menyatakan dengan khusus bahawa kesan bencana tubuh badan kepada si mati tersebut adalah 'mencukupi pada lazimnya untuk menyebabkan kematian'. Namun begitu, apa yang perlu dipertimbangkan bukanlah ungkapan perkataan tersebut secara khusus di dalam keterangan SP2, tetapi sama ada terdapatnya keterangan terutamanya dari sudut perubatan untuk membantu mahkamah membuat kesimpulan bagi mencapai maksud ungkapan tersebut.

[108] Berhubung isu ini, Mahkamah Persekutuan melalui Abdul Rahman Sebli HMP dalam kes *Zulkiple bin Mohamad v Public Prosecutor* [2022] 1 MLJ

479; [2022] 1 CLJ 673 telah menjelaskan:

> [15] *Whether the injury is sufficient in the ordinary course of nature to cause death is essentially a question of fact for the court to determine*. Since however, this is a matter that is in the realm of medical science, *medical evidence is needed to assist the court in arriving at a decision*. Obviously, it is not for any layperson without the proper medical training and background to determine as a matter of scientific fact whether a particular injury is sufficient in the ordinary course of nature to cause death ...
>
> ... [20] The crucial part of SP13's evidence was that the injuries on the deceased's head could cause direct or almost immediate fatality, ie, death ('Kecederaan-kecederaan tersebut boleh secara terus atau sehampir secepat menyebabkan kematian'). He testified that the deceased would not be able to survive the injuries.
>
> [21] This effectively means that the injuries were of a kind that is 'sufficient in the ordinary course of nature to cause death' within the meaning of cl (c) of s 300 of the Penal Code although SP13 did not describe the injuries in those exact terms either in his post-mortem examination report or in his oral evidence in court. At the trial, SP13 was shown the baseball bat (P10A) that the police seized from the scene of crime and he confirmed that it could cause injuries 1, 2, and 3 found on the deceased's head.

[109] lsu ini juga telah dibincangkan oleh mahkamah ini dalam kes *Mohd Shawal bin Abdullah v Pendakwa Raya* (Rayuan Jenayah K-OS(M)-160–04 Tahun 2016) (tidak dilaporkan) yang menyatakan seperti berikut:

> [8] Soalan selanjutnya adalah sama ada bencana tubuh tersebut, dipertimbangkan secara objektif, adalah mencukupi pada lazimnya untuk menyebabkan kematian. Daripada apa yang dapat kami fahami, peguam terpelajar seolah-olah menyarankan bahawa mesti adanya dapatan hakim bicara atau keterangan pakar patologi yang menyebut, secara khusus, kesan bencana tubuh badan tersebut dengan kata kata tepat yang berikut 'mencukupi pada lazimnya untuk menyebabkan kematian' (sufficient in the ordinary course of nature to cause death). *Kami tidak bersetuju dengan saranan itu seolah-olah menghendaki ungkapan sedemikian diucapkan sebagai satu mentera keramat apabila klausa (c) hendak digunakan*. Selaras dengan maksud ujian objektif seperti mana yang digariskan dalam kes *Virsa Singh v The State of Punjab*, dan peranan mahkamah dalam membuat penentuan itu, apa yang perlu dicari dan dipertimbangkan adalah sama ada terdapatnya keterangan terutamanya dari sudut perubatan dalam membantu mahkamah untuk membuat kesimpulan untuk mencapai maksud ungkapan tersebut.

[110] Dalam kes di hadapan kami ini, menurut SP2, luka tetakan berganda di kepala si mati telah menyebabkan banyak pendarahan dan pada masa yang sama telah menyebabkan keretakan dan terpotongnya sebahagian tulang tengkorak kepala si mati. SP2 juga menyatakan terdapatnya luka-luka lebam pada bahagian otak si mati yang menunjukkan wujudnya kecederaan pada bahagian otak si mati. Oleh itu, SP2 berpendapat bahawa luka tetakan berganda di kepala si mati telah menyebabkan kematiannya.

[111] SP2 di dalam. keterangannya juga telah menolak kemungkinan kecederaan-kecederaan lain pada tubuh si mati seperti kesan bakar, kesan abrasi, dan kesan tetakan di tempat lain selain daripada kepala si mati sebagai tidak vital atau tidak begitu penting sehingga boleh menyebabkan kematian si mati. Tambahan pula, SP2 berpendapat bahawa kecederaan tetakan berganda pada kepala si mati adalah konsisten dengan senjata yang tajam dan berat seperti parang, kapak dan sebagainya. lni adalah konsisten dengan versi saksi pendakwaan yang melihat si mati ditetak bertubi-tubi dengan menggunakan parang.

[112] Oleh itu, kami bersetuju dengan hakim bicara dan berpuas hati bahawa kesan bencana tubuh badan kepada si mati tersebut adalah 'mencukupi pada lazimnya untuk menyebabkan kematian' seperti yang dinyatakan di bawah s 300(c) Kanun Keseksaan.

[113] Maka, kami tidak bersetuju dengan hujahan perayu kelima berkenaan isu ini.

[114] Secara keseluruhannya, kami mendapati bahawa isu-isu yang dibangkitkan oleh perayu kelima di dalam rayuan ('R24') adalah tidak bermerit dan haruslah ditolak.

KESIMPULAN

[115] Kesimpulannya, berdasarkan kepada kesemua yang telah dinyatakan di atas, kami mendapati bahawa rayuan perayu-perayu di sini adalah tidak bermerit dan tiada asas untuk kami mengganggu dapatan dan keputusan hakim bicara. Kami juga mendapati bahawa sabitan terhadap perayu-perayu adalah selamat.

[116] Oleh itu, mahkamah ini menolak rayuan perayu-perayu dalam R20, R21, R22, R23 dan R24. Sabitan dan hukuman terhadap perayu-perayu di dalam kes-kes rayuan tersebut adalah dikekalkan.

Rayuan perayu-perayu ditolak.

Dilaporkan oleh Ahmad Ismail